IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 189

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

v.

UNITED TRANSPORTATION UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO AND NORTH WESTERN
RAILWAY COMPANY, a corporation,

Plaintiff,

vs.

Civil Action
No. 69-C-2401

UNITED TRANSPORTATION UNION,
a voluntary association,

Defendant.

DOCKET ENTRIES

11-19-69 - Defendant temporary restrained. Plaintiff's bond fixed at $5,000.00. Defendant to show cause at 2 p.m. on November 28, 1969 why plaintiffs motion for preliminary injunction should not be granted etc. - DRAFT-Perry, J. Mailed Notice 11-20-69

11-20-69 - Filed Verified complaint and 4 copies

11-20-69 - Filed Bond as security for restraining order

11-20-69 - Filed Designation of case

11-20-69 - Filed 2 affidavits pursuant to G.R. 39 by attorneys for plaintiff

11-20-69 - Filed Affidavit of James E. Wolfe on behalf of Chicago and North Western Railway Company

11-20-69 - Filed Affidavit of James R. Wolfe on behalf of Chicago and North Western Railway Company

11-20-69 - Filed Affidavit of Larry S. Provo on behalf of the plaintiff, Chicago and North Western Railway Company

11-20-69 - Filed Motion of plaintiff for preliminary injunction

11-20-69 - Filed Motion of Plaintiff for temporary restraining order

11-20-69 - Issued summons and 4 copies with 4 copies of complaint.

11-21-69 - Filed appearance of defendant and that of its attorney.

11-21-69 - Filed affidavit under Rule 39.

11-25-69 - Filed Notice, Defendant's motion to vacate temporary restraining order and affidavit of Francis D. Tuffley.

11-25-69 - Filed Plaintiff Carrier's memorandum in support of its motion for preliminary injunction.

11-25-69 - Filed Carrier's memorandum in opposition to defendant's motion to vacate temporary restraining order.

11-25-69 - Filed Affidavit pursuant to G.R. 39 by attorney for defendant.

11-25-69 - Motion to vacate temporary restraining order argued in part for the defendant and continued to 2 p.m. on 12-2-69 - Perry, J. Mailed notice 11-26-69.

11-28-69 - Defendants show cause why plaintiffs motion for preliminary injunction should not be granted continued to 12-2-69 at 2 p.m. Order temporary restraining order extended in full force and effect to and including 12-6-69 at midnight - Perry, J. Mailed Notice 11-28-69.

12-1-69 - Filed Amendment to verified complaint.

12-2-69 - Filed defendant's verified answer to verified complaint.

12-2-69 - Filed defendant's memorandum.

11-25-69 - Order cause referred to the Executive Committee for reassignment to the calendar of Judge Perry, who has agreed to accept, same, if Judge Hoffman agrees to the transfer and acceptance of another case from Judge Perry's calendar. The parties have agreed and consented in open court to such reassignment for the reason that it is an emer-

gency matter requiring an early hearing and Judge Hoffman would not be able to entertain an early hearing because of pressure of other matters requiring his attention, now pending on his calendar. PERRY, J. Mld Notices 12-3-69.

11-25-69 - IT IS ORDERED that the above entitled cause be, and the same is hereby reassigned to Judge PERRY. The Executive Committee. (DRAFT). Mld Notices 12-3-69.

12-2-69 - Evidence heard in part for plaintiff on its motion for a preliminary injunction and continued to December 3, 1969 at 1:30 P.M. Motion of defendants to vacate restraining order continued to December 3, 1969. PERRY, J. Mld Notices 12-3-69.

12-3-69 - Further evidence heard for the plaintiff and cause continued to December 4, 1969 - Perry, J.

12-4-69 - Further evidence heard for the plaintiff and cause continued to December 5, 1969 - Perry, J. Mailed Notice 12-8-69 (2 orders).

12-5-69 - Filed Carrier's reply memorandum.

12-5-69 - Further evidence heard for the plaintiff and plaintiff rests. Motion defendants to deny preliminary injunction argued. Cause continued to 12-11-69 at 2 p.m. for entry of findings of fact, conclusions of law and judgment order - Restraining order continued in full force and effect to 6 p.m. 12-12-69 - Perry, J. Mailed Notice 12-9-69.

12-11-69 - Filed bond as security for injunction pending appeal.

12-11-69 - Filed plaintiff's motion for injunction pending appeal.

12-11-69 - Filed memorandum in support of plaintiff's motion for an injunction pending appeal.

12-11-69 - Enter findings of fact and conclusions of law. Order defendants motion to vacate temporary restraining

order issued November 19, 1969 denied. Plaintiff's motion for preliminary injunction denied. Order plaintiff to recompense defendants, etc. Complaint dismissed at plaintiff's cost. (DRAFT) Defendant enjoined pending appeal and bond fixed at $25,000.00. (DRAFT) Plaintiff's bond in the amount of $25,000.00 approved and filed. - Perry J. Mailed notices 12-12-69

12-11-69 - Filed plaintiff's notice of appeal.

12-12-69 - Mailed copy to defendant's attorneys.

12-12-69 - Filed defendant's notice of appeal.

12-12-69 - Filed defendant's request for short record on appeal.

12-12-69 - Mailed copy of notices of appeal to plaintiff's attorneys.

12-12-69 - Clerk's File Copy of Transcripts of proceedings had before Judge Perry on November 25, December 2, 3,4,5, and 11, 1969 filed by Official Court Reporter., (6 volumes)

12-15-69 - Certified and transmitted to U.S.C.A., 7th Circuit, short record on appeal as requested by defendant-appellant.

12-18-69 - Filed Bond on Appeal.

12-24-69 - Filed plaintiff-appellant's request for complete record on appeal.

12-26-69 - Filed plaintiff's exhibits 1 through 25.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

VERIFIED COMPLAINT

Now comes the plaintiff, Chicago and North Western Railway Company, a corporation, by its attorneys, James P. Daley, Robert Schmiege, William H. Dempsey, Jr., and David Booth Beers, and for its cause of action against the defendant, United Transportation Union, an unincorporated association, states:

1. This action arises under the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. §§ 151-160. The jurisdiction of this Court is grounded upon 28 U.S.C. §§ 1331 and 1337. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of ten thousand dollars.

2. The plaintiff, Chicago and North Western Railway Company (hereinafter referred to as the "C&NW" or the "carrier"), is a corporation which is engaged in the transportation of freight and passengers by rail in interstate commerce and is a "carrier" as defined in Section 1 of the Railway Labor Act (45 U.S.C. § 151).

3. The defendant, United Transportation Union (hereinafter referred to as the "UTU" or the "organization") is an unincorporated voluntary association and a labor organization with an office and place of business at 120 West Madison Street, Chicago, Illinois, which represents for purposes of collective bargaining under the Railway Labor Act certain of the plaintiff's employees. The defendant, UTU, is the successor organization to four other labor organizations, including the former Brotherhood of Railroad Trainmen (hereinafter referred to as the "BRT").

4. On July 3, 6 and 7, 1965, the BRT served upon the plaintiff notices proposing changes in the existing collective bargaining agreements between the carrier and the organization. The notices were purportedly served under Section 6 of the Railway Labor Act (45 U.S.C. § 156), and in com-

bination they proposed a rule, to be effective January 26, 1966, requiring a minimum crew consist of one conductor (or foreman) and two trainmen (or helpers) in most classes of service on the carrier, and a minimum crew consist of one conductor and three brakemen in a few other classes of service on the carrier. These notices were similar to notices served by the BRT upon more than eighty other railroads at or about the same time. On December 24, 1965, the plaintiff served upon the BRT counter-notices under Section 6 of that Act, proposing the elimination of existing crew consist rules and the creation of a new rule giving management the right to determine crew size unilaterally in all classes of service. These counter-notices were similar to notices served upon the BRT by more than eighty other railroads at or about the same time.

5. The BRT notices and carrier counter-notices referred to in Paragraph 4 above were discussed by the parties in conferences held on the property of the carrier, but no agreements were reached. The dispute was also the subject of mediation under the auspices of the National Mediation Board. However, mediation failed to produce any agreements, and the Mediation Board urged the parties to submit the dispute to arbitration. When the BRT declined, on October 16, 1969, the Board terminated its services.

6. During the period of the dispute alleged in Paragraphs 4 and 5 above, the BRT was succeeded as an entity by the defendant, UTU, although the individual negotiators for the two organizations have for the most part been the same throughout, and the positions now taken in the dispute by the UTU are the same as those taken formerly by the BRT.

7. The UTU takes the position that from and after November 16, 1969, or thirty days after the termination of the Mediation Board's services in the dispute alleged in Paragraphs 4 and 5 above, the procedures of the Railway Labor Act for resolving disputes of the kind raised by the BRT's notices and the carrier's counter-notices have been exhausted. The UTU takes the further position that from and after November 16, 1969, it has been free to strike the

carrier if it does not accede to the organization's demands in this dispute.

8. The plaintiff disagrees with the position of the UTU set forth in Paragraph 7 above. The plaintiff takes the position that the UTU has not complied with the requirements of Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First) "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions" in the present dispute, in that:

First: Having insisted in the foregoing dispute upon bargaining separately with the plaintiff carrier instead of bargaining jointly with all the railroads upon which the BRT had served like notices, nevertheless

(a) The defendant has refused to bargain on the proposals in the carrier's counter-notices to reduce the size of main line road crews;

(b) The defendant has insisted that any agreement on the C&NW be no more favorable to the C&NW than agreements reached on the other railroads upon which the BRT served like notices;

(c) The defendant has entered negotiations with a fixed position and a determination not to deviate from the position regardless of what relevant consideration might be advanced by the C&NW; and

Second: Notwithstanding the foregoing, the defendant has refused to engage in national handling of this dispute and to negotiate on a joint basis a national crew consist agreement with all the railroads on which the BRT served like notices.

9. The UTU has threatened to strike the plaintiff. For the reasons set forth in Paragraph 8 above, this threatened strike of the carrier by the UTU is in violation of the Railway Labor Act.

10. If not enjoined by this Court the illegal strike alleged in Paragraph 9 above will cause great and irreparable injury to the plaintiff and to the public. The operation of the plaintiff will be brought to a virtual halt. The plaintiff

operates in eleven states, serving ten major cities; has 11,547 miles of track; interchanges with other railroads at some 230 points; transports over 4,000 loaded freight cars a day; serves about 20,000 industries, of which several hundred plants (including Chrysler Corporation at Belvidere, Illinois, American Motors Corporation at Kenosha, Wisconsin, Green Giant Company at Le Seuer, Minnesota, and Minnesota Mining & Manufacturing Company at St. Paul, Minnesota) depend entirely upon the plaintiff carrier for rail service; moves both munitions and defense equipment (providing the only rail service to Great Lakes Naval Training Station, Fort Sheridan Army Base, Box Elder Air Force Base, and Badger Ordnance Works); and provides service for about 90,000 passengers a day in its passenger service between Chicago, Illinois and its suburbs. Thus, a strike if not enjoined will greatly interfere with the transportation in interstate commerce of freight and passengers, including military personnel and material, and food and other lading essential to the public health and safety. Moreover, the plaintiff will be deprived of over $750,000 a day in operating revenues, will be unable to maintain or use its properties and equipment in which it has a substantial investment, will lose business permanently to competing forms of transportation, and will be unable to fulfill its obligations under the Interstate Commerce Act to serve the public. Finally, about 14,200 of the plaintiff's employees will be deprived of their positions and earnings for the duration of the strike.

WHEREFORE, the plaintiff prays that this Court (1) adjudge and declare that the procedures of the Railway Labor Act have not been exhausted with respect to the dispute alleged in this complaint and that the UTU has not been free to strike the plaintiff on or after November 16, 1969; (2) restrain and enjoin the UTU, its divisions, locals, officers, agents, employees, members and all persons acting in concert with them for authorizing or engaging in any strike against or picketing of the plaintiff in connection with the dispute alleged in this complaint; and (3) grant to the plaintiff its costs and such other relief as may be proper.

[subscriptions and verification omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

MOTION FOR TEMPORARY RESTRAINING ORDER

Now comes the plaintiff, Chicago and North Western Railway Company, by its attorneys, and moves the Court for a temporary restraining order, restraining the defendant, United Transportation Union, each of its divisions, lodges, officers, agents, servants, counsellors, members, and all persons acting by, through and for it, or on its behalf, from authorizing or engaging in any strike or picketing pending a hearing and determination of the plaintiff's motion for a preliminary injunction, for the reasons and upon the grounds that immediate and irreparable injury, loss, and damage will result to the plaintiff and to the public before a hearing can be had thereon, all as more particularly appears in the verified complaint herein, the Affidavit of James E. Wolfe, the Affidavit of James R. Wolfe, and the Affidavit of Larry S. Provo, all filed herewith.

[Subscriptions and verification omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

MOTION FOR PRELIMINARY INJUNCTION

Now comes the plaintiff, Chicago and North Western Railway Company, by its attorneys, and moves the Court for a preliminary injunction, enjoining the defendant, United Transportation Union, each of its divisions, lodges, officers, agents, servants, counsellors, members, and all persons acting by, through or for it, or on its behalf, from authorizing or engaging in any strike or picketing pending a final judgment on the merits of the plaintiff's complaint herein.

As is more fully set forth in the verified complaint herein, and in the affidavits of James E. Wolfe, James R. Wolfe,

and Larry S. Provo, all filed herewith, the grounds for this motion are as follows:

1. In 1965 and 1966 the parties exchanged bargaining notices served under Section 6 of the Railway Labor Act (45 U.S.C. § 156), each demanding new rules to govern the size or "consist" of crews on the plaintiff's system. The union proposed in general that all crews be operated with a minimum crew consist of one conductor and two brakemen in most classes of service and a minimum crew consist of one conductor and three brakemen on some crews in road service. The carrier's proposal was that existing crew consist rules be eliminated and that a new rule commit the matter of determining proper crew size to managerial discretion. Like notices were exchanged at about the same time by the union and more than eighty other railroads.

2. After conferences on the property of the carrier and mediation sessions under the auspices of the National Mediation Board had been conducted pursuant to Sections 5 and 6 of the Railway Labor Act (45 U.S.C. §§ 155, 156) without any agreements being reached, the Mediation Board urged the parties to settle the dispute by arbitration. When the union refused to arbitrate, the Mediation Board terminated its services on October 16, 1969.

3. The union has taken the position that from and after November 16, 1969–thirty days following the termination of the Mediation Board's services–the procedures of the Railway Labor Act for resolving disputes of this kind have been exhausted and that the union is therefore free to strike the carrier to enforce its demands.

4. The required procedures of the Railway Labor Act have not been exhausted with respect to this dispute, because the union has not complied with the requirements of Section 2 First of the Act (45 U.S.C. § 152 First) "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions" in that:

First: Having insisted in the foregoing dispute upon bargaining separately with the plaintiff carrier instead of bar-

gaining jointly with all the railroads upon which the BRT had served like notices, nevertheless

(a) The defendant has refused to bargain on the proposals in the carrier's counter-notices to reduce the size of main line road crews;

(b) The defendant has insisted that any agreement on the C&NW be no more favorable to the C&NW than agreements reached on the other railroads upon which the BRT served like notices;

(c) The defendant has entered negotiations with a fixed position and a determination not to deviate from the position regardless of what relevant considerations might be advanced by the C&NW; and

Second: Notwithstanding the foregoing, the defendant has refused to engage in national handling of this dispute and to negotiate on a joint basis a national crew consist agreement with all the railroads on which the BRT served like notices.

5. Under these circumstances the strike by the union in this dispute is in violation of the Railway Labor Act and will cause grave and irreparable injury to the plaintiff and to the public. It should therefore be enjoined.

[Subscriptions and verification omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

AFFIDAVIT OF JAMES E. WOLFE ON BEHALF OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY

James E. Wolfe, of full age, being duly sworn according to law, upon his oath deposes and says:

1. Prior to my retirement on July 31, 1967, I was the Chairman of the National Railway Labor Conference, which has since January 1, 1963, been the bargaining arm in national labor matters for most of the nation's railroads.

In that position I was the Chief Negotiator and Spokesman for the railroad industry in all national labor disputes. * * *

2. The issue of manning requirements on railroad freight and passenger trains and yard assignments—that is, the number of men needed to operate trains—has divided the nation's railroads and the unions representing their operating employees for many years. * * *

3. * * * In the 1950's trains were generally required to have a minimum crew consist of one conductor (sometimes called a "foreman" in yard service) and two or three trainmen or brakemen (sometimes called "helpers" in yard service). * * *

4. In this situation, substantially all the nation's railroads, on November 2, 1959, initiated steps for abolishing the long existing and obsolete crew consist rules, as well as a number of other work rules requiring inefficient use of manpower, by serving upon the five operating unions, including the Brotherhood of Railroad Trainmen (hereinafter referred to as the "BRT"), with bargaining notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156). (On January 1, 1969, the BRT was merged, together with three other unions, into the United Transportation Union. Throughout this affidavit, I use the term "BRT" for purposes of simplicity even where the events in question occurred after January 1, 1969.) With respect to the consist of train crews, the carriers in these notices proposed to establish a new national rule which in general would give to the carriers the right to determine the consist of train crews in most classes of train service.

5. The Chicago and North Western Railway Company (hereinafter referred to as the "C&NW") has participated in this dispute from its inception in 1959. Until 1963 the C&NW was represented through a Power of Attorney by the Western Carriers' Conference Committee. When the National Railway Labor Conference (hereinafter referred to as the "NRLC") was formed on January 1, 1963, the

C&NW was represented through a Power of Attorney by the Conference Committees and the NRLC.

6. In the months following the service of the November 2, 1959, notices, conferences to discuss these notices were held within the framework of the Railway Labor Act on the properties of the individual carriers. No agreements were reached, however. By letter of June 9, 1960, the chairmen of the Eastern, Southeastern, and Western Carriers' Conference Committees invited the chief executives of the five operating unions, including the BRT, to commence national negotiations "to deal concertedly with the Carriers' Conference Committees" on the subject of the notices. All the unions agreed, and meetings of national bargaining committees designated by the carriers and by the organizations were thus begun on June 9, 1960. They extended through October 17, 1960.

7. On September 7, 1960, the BRT and the four other operating unions served counter-notices upon most of the nation's railroads pursuant to Section 6 of the Railway Labor Act. The BRT and other organizations representing employees in train service (in contrast to engine service) proposed a new national rule which, in general, would require the use of not less than one conductor (or foreman) and two trainmen (or helpers) on virtually all crews in road and yard service.

8. * * * [O]n October 17, 1960, the chief executive officers of the five operating organizations and the chairmen of the Carriers' Conference Committees entered into an agreement requesting the President to establish a Presidential Railroad Commission to investigate and report the facts with respect to the controversy between the parties involving their respective Section 6 notices of November 2, 1959, and September 7, 1960. * * *

9. * * * [O]n November 1, 1960, President Eisenhower by Executive Order No. 10891 established a Presidential Railroad Commission * * *

10. * * * On February 28, 1962, the Commission delivered a comprehensive report of its findings and recommendations to President Kennedy. The carriers accepted the Commission's recommendations; they were rejected by the Unions. On the crew consist issue, the Commission found that there was "overmanning" of trains in road and yard service and recommended that an agreement be negotiated by the parties which would provide for the adoption of national criteria for determining the proper consist of crews, for negotiation with respect to particular crews on individual carriers, and for local arbitration in the event a carrier and the organizations could not agree upon proposed changes in the consist of train crews. (Commission Report, pp. 57-60). The Commission stated that it believed its "recommendations with respect to this issue should have nationwide application." (Commission Report, p. 64.)

11. National conferences on the parties' Section 6 notices were resumed on April 2, 1962 and continued through May 17, 1962.

12. On May 21, 1962, the BRT and the four other organizations involved in these national negotiations applied for the mediatory services of the National Mediation Board pursuant to Section 5 of the Railway Labor Act (45 U.S.C. § 155). Mediation sessions with representatives of the carriers and of the organizations were conducted under the auspices of the Chairman of the Mediation Board for nearly a month without reaching an agreement. On June 26, 1962, the Board requested and urged the parties to agree to submit the controversy to arbitration under Section 7 of the Railway Labor Act (45 U.S.C. § 157); and while the carriers accepted this proffer of arbitration, the Unions rejected it. On July 16, 1962, the Board advised the parties that it had found no practical method of resolving the controversy and on that day terminated its mediatory services.

13. On July 17, 1962, upon receipt of notice that the Mediation Board had terminated its services, the carriers notified the five organizations that as of August 16, 1962,

the carriers would put into effect rules providing for changes in crew consist requirements * * *. On July 26, 1962, the organizations brought a court action to enjoin this plan, * * * Subsequently, on March 4, 1963, the Supreme Court in *Brotherhood of Locomotive Engineers v. Baltimore & O. RR.*, 372 U.S. 284 (1963), held that the parties' Section 6 notices were proper under the Railway Labor Act, and that the parties were free to resort to self-help—the carriers to make effective their proposals, the unions to strike—subject only to the possible creation of an Emergency Board by the President under Section 10 of the Railway Labor Act (45 U.S.C. § 160).

14. Following this decision by the Supreme Court, the President on April 3, 1963, signed Executive Order No. 11101 creating Emergency Board No. 154 to investigate the work rules dispute and report its findings. The Emergency Board commenced its work on April 11, 1963, held a series of meetings with the parties, and reported to the President on May 13, 1963. The findings and recommendations of this Board were substantially the same in principle as those of the Presidential Railroad Commission. * * * The report and these recommendations were promptly accepted by the carriers. The Unions, on the other hand, announced that they would neither accept nor reject the Board's recommendations but that they were willing to use the recommendations as a basis for further negotiations. * * *

15. National negotiations between representatives of the carriers and of the organizations were resumed on May 20, 1963, and continued in the form of conferences and mediation sessions until July 10, 1963. The parties were assisted by the mediatory efforts of the Secretary of Labor, who prepared a draft memorandum of agreement for the settlement of certain aspects of the controversy, including the crew consist issue. The Secretary's suggestions were accepted by the carriers but rejected by the Unions. Similarly, the carriers accepted but the Unions rejected a proposal by President Kennedy that the parties submit all issues in dispute to Associate Justice Goldberg of the

Supreme Court for mediation and, if necessary, for arbitration. On July 10, 1963, with the parties agreeing to withhold unilateral action in the dispute, the President appointed a six-member subcommittee of his Labor-Management Advisory Committee, headed by the Secretary of Labor, to undertake a further comprehensive review of the facts and issues in the controversy. This committee, in a report to the President on July 19, 1963, found that "developments since the report of the Emergency Board had narrowed considerably the area of disagreement"; that both parties had "agreed in principle to a procedure for handling the problem" based upon the recommendations of the Secretary of Labor; but that the parties had not been able to agree upon the scope of the suggested procedure or upon the acceptability of arbitration as a terminal step in resolution of the dispute.

16. The President on July 22, 1963, * * * urged Congress to enact a law requiring the issues dividing the parties to be submitted to the Interstate Commerce Commission for final and binding disposition. The Congress responded with the enactment of Public Law 88-108, 77 Stat. 132, which was approved by the President on August 23, 1963. This Act directed that certain portions of the controversy, including the crew consist issue, be submitted for "complete and final disposition" by a board of arbitration. * * *

17. The board of arbitration established by Public Law 88-108, designated as Arbitration Board No. 282, consisted of two representatives named by the carriers, of whom I was one, two named by the organizations, and three neutral members. The Board held hearings, considered evidence, and heard arguments between September 11, 1963, and November 25, 1963, when it filed its Award in the United States District Court for the District of Columbia.

18. The Award of Arbitration Board No. 282 provided in Article III for a resolution of the crew consist dispute. It established a procedure whereby either a carrier or Union could serve upon the other written notice of proposed

changes in the rules governing the consist of train and yard crews on the carriers' lines. If the parties were unable to agree upon such proposed changes, either side could submit the issue to a special board of adjustment whose award would be final and binding upon the parties. Part C of Article III of the Award prescribed national guidelines which were to be followed by all special boards of adjustment in making their awards. Under Part D of Article III of the Award, employees in active service as of the effective date of the Award were generally to be retained in such service until they retired, were discharged for cause, or were otherwise removed from employment by natural attrition.

19. The Award of Arbitration Board No. 282 became effective on January 25, 1964. * * *

20. Pursuant to the provisions of Article III of the Award of Arbitration Board No. 282, 96 crew consist awards were rendered by special board of adjustment on the individual railroads, including nine on the C&NW and 95 crew consist agreements were executed on individual railroads, including two on the C&NW, thereby obviating the need for arbitration in those cases. All these awards and agreements resulted from notices by the carriers to reduce the size of particular crews. The special board of adjustment awards authorized the elimination of 4,855 positions as unneeded, which was 87.3% of what the carriers sought.

21. During the period of the Award of Arbitration Board No. 282 President Luna of the BRT commenced new crew consist negotiations on a multi-carrier basis with a number of railroads in the eastern part of the United States. At this time there were laws and administrative regulations, sometimes called "full crew laws," in several eastern states which imposed even greater crew-size burdens upon the railroads than the BRT's demands of "one and two" (one conductor and two brakemen). * * * It was thought by many of these roads, therefore, that relief—even though limited—could only be achieved through the repeal of the full crew laws.

22. For many years the rail unions, including the BRT, had successfully worked to prevent repeal of the full crew laws in these eastern states. * * * Nevertheless, on January 29, 1965, Mr. Luna negotiated for the BRT a multi-carrier agreement with the eastern roads which (1) guaranteed to the union a minimum crew consist of one conductor (or foreman) and two brakemen (or helpers) in virtually all classes of road and yard service; and (2) guaranteed to the railroads that the union would immediately withdraw all opposition to the repeal of existing full crew laws and would not seek the enactment of any such new laws. This agreement, commonly called the "Luna-Saunders Agreement" after Mr. Luna and the Chairman of the then Pennsylvania Railroad, is effective until January 1, 1970, and thereafter until changed by the parties under the Railway Labor Act. * * * Shortly thereafter the New York full crew law relating to train crews was repealed. * * *

23. Prior to January 25, 1966, when Award 282 expired, the BRT began its campaign to roll back the 96 awards and 95 agreements made pursuant to Award 282. During 1965 the BRT served Section 6 notices, identical in substance, on more than 80 carriers (not including, of course, those eastern roads which were parties to the Luna-Saunders Agreement). These notices proposed that effective January 26, 1966, the crew consist rules of the carriers provide that in all classes of service there be a minimum crew consist of one conductor and two brakemen or helpers. Thus, the BRT's notices were virtually identical to its original proposals of 1960. Then in the fall of 1965 the Mediation Board, at the BRT's request, docketed for mediation the disputes over the BRT's notices on a large number of railroads.

24. In order to permit concurrent handling of the BRT proposals and such proposals as the carriers would make with respect to future crew consist rules, the carriers served counter-notices upon the BRT in December of 1965. These counter-notices proposed the elimination of all agreements, rules, regulations, and practices providing for a stipulated

number of trainmen, brakemen, or helpers on each crew and proposed that management have the right to determine the number of men to be used on such crews. These counter-notices, and similar notices served by other carriers during December, 1965, invited the BRT to join in the handling of the proposals of both the BRT and the carriers "on a joint national basis" if agreements could not be reached in local negotiations. However, in each instance the BRT replied that it was unwilling to engage in national handling as to any phase of the dispute.

25. The BRT's refusal to negotiate with respect to this dispute on a concerted national basis violated a longstanding custom and practice in railway labor-management relations of handling identical disputes involving a number of carriers on such a basis. * * *

* * * * *

40. * * * Mr. Luna shortly after the enactment of Public Law 88-108 announced the BRT's new determination to refuse future national handling of work rules disputes in order to keep the BRT "in a position to use our economic strength." * * *

* * * * *

42. In late 1965 and early 1966, at the same time that it was claiming that the crew consist rules should be changed on a carrier-by-carrier basis pursuant to Section 6 of the Railway Labor Act, the BRT launched a second assault on the awards and agreements made pursuant to Award 282. In this connection the Brotherhood notified the carriers that in its view the crew consist rules which were in effect prior to Award 282 would automatically revive upon the expiration of the Award in January of 1966. The BRT demanded that crew assignments that had been abolished pursuant to the Award be immediately restored. The carriers took the position that it was clear from the purpose and history of P.L. 88-108 that Award 282 was not to be a mere interim measure and that rules established pursuant to that Award were to continue in

force until changed in accordance with the procedures of the Railway Labor Act.

43. In order to seek a resolution of this disagreement, on January 19, 1966, nearly 150 carriers, including the C&NW, filed suit in the United States District Court for the District of Columbia against the BRT and others for declaratory and injunctive relief. In this suit the railroads contended that the crew consist rules then in effect could not be changed except in accordance with the procedures of Section 6 of the Railway Labor Act. On March 3, 1966, the District Court, by Judge Alexander Holtzoff, sustained the carriers' position in *Akron & Barberton Belt RR. v. Brotherhood of RR. Trainmen*, 250 F. Supp. 691. The Court ruled that Award 282 and the agreements and awards made pursuant thereto created new work rules which remained in effect after January 25, 1966, and that these new rules could be changed only by the procedures provided in Section 6 of the Railway Labor Act. This ruling was later affirmed by the United States Court of Appeals for the District of Columbia Circuit, 385 F.2d 581 (1967), and *certiorari* was denied by the Supreme Court, 390 U.S. 923 (1968).

44. As I have said, after 1963 the BRT absolutely refused to participate in the national negotiation of the crew consist dispute. In an effort to bring about national handling of the crew consist issue, the National Railway Labor Conference invoked the jurisdiction of the Mediation Board with respect to all counter-notices served by the carriers during December, 1965. This invocation was made on April 4, 1966, and the next day the Mediation Board in effect denied the carriers' request and directed them to proceed to the local properties for the mediation of the individual disputes.

45. Judgment was entered in the *Akron* litigation by the District Court on April 6, 1966. At that time the Court ruled that the parties' "[n]otices of proposed changes in crew-consist rules served pursuant to Section 6 of the Rail-

way Labor Act, between January 25, 1964, and January 25, 1966, . . . did not become effective under the Railway Labor Act until January 26, 1966." Nevertheless, the Mediation Board treated the BRT's prior invocation of mediation as having been proper, and in April, 1966, the Board proffered arbitration to four carriers, the Atlantic Coast Line Railroad Company, the Boston & Main Corporation, the Missouri Pacific Railroad Company, and the Louisville & Nashville Railroad Company.

46. On April 12, 1966, these four carriers filed a Motion For Supplemental Relief in the *Akron* litigation. In that motion the carriers requested an order declaring that the crew consist rules could not be changed until the initial conferences between the parties prescribed by Sections 5 and 6 of the Act were held *after* the expiration of Award 282 and until the other procedures of the Act were also exhausted *subsequent* to such conferences. On May 31, 1966, the District Court granted the carriers' motion. The Court ruled that the notices of the parties were not effective until January 26, 1966; that until this time the parties were under no obligation to confer; and that meetings held before January 26th did not constitute "conferences" within the meaning of Sections 5 and 6 of the Act. Therefore, the Court concluded that neither side could resort to self-help; that conferences should be commenced within a reasonable time after the entry of the order; and that recourse to the Mediation Board could not be had until conferences fulfilling the requirements of Sections 5 and 6 of the Act were held. Two days later, June 2nd, the Mediation Board "urged the parties" to hold such conferences promptly and advised that it was continuing the cases which had been docketed before it.

47. As the dispute was considered in conference on the different railroads following the *Akron & Barberton Belt* litigation, the carriers again urged the BRT to agree to national handling of the dispute, and again the same negative answers were given by the BRT on each railroad.

There was no question, of course, that the actual handling of the dispute on the BRT's side was national and that Mr. Luna was directing the progress of the dispute himself on a uniform basis on all carriers. Thus, on June 18, 1965, Mr. Luna wrote all his general chairmen on individual roads setting forth the BRT's position as to the effect of the expiration of Award 282, directing the service of the new uniform Section 6 notices, and attaching the text of the notices' demand for a uniform one-and-two crew consist rule. These, then, were the notices which were served identically on each of the more than eighty carriers commencing in June of 1965. When the carriers responded, on July 9, 1965, Mr. Luna wrote his general chairmen again and enclosed a uniform draft reply to be sent to all roads. Another uniform reply to all the carriers was drafted and sent to the general chairmen by Mr. Luna on October 5, 1965. When the carriers served their counter-notices in December of 1965, Mr. Luna again dictated a uniform response for the general chairmen in a letter to them on December 28, 1965. Again, on January 6, January 14, March 18, March 31, and June 9, 1966, Mr. Luna wrote to the general chairmen on the individual railroads with the text of identical letters to be sent out to all the carriers in succeeding phases of the dispute. Thus, although Mr. Luna professed to have come to the new determination that local conditions required crew consist rules to be negotiated on a carrier-by-carrier basis, the dispute continued to be handled in fact on a uniform, national basis.

48. On August 29 and 30, 1966, I met in Chicago with Mr. Luna and with Mr. Leverett Edwards, Chairman of the National Mediation Board, at Mr. Edwards' suite in the Blackstone Hotel, for the purpose of discussing possible ways of resolving the dispute over the BRT and carrier crew consist notices mentioned above. In particular, we sought to determine whether there was any common ground between the stated position of the BRT that these notices were not an appropriate subject for national handling and

the position of the carriers that they were. During these meetings, Mr. Edwards suggested, and Mr. Luna and I orally agreed, without waiver of the position of either side with respect to national *versus* local handling of the dispute, that a series of "test" negotiations would be conducted between representatives of six selected carriers and the NRLC on the one hand, and those of the BRT on the other, in order to see whether any principles or guidelines might emerge which could serve as a pattern for agreements on other railroads or for a national agreement to settle the entire crew consist dispute. It was agreed that these negotiations would be held at the headquarters of each railroad selected, would be conducted by a mediator to be assigned to each railroad by the National Mediation Board, and would be attended by representatives of each railroad, the NRLC, and the BRT. It was agreed that Mr. Luna, Mr. Edwards, and I would meet again at the conclusion of these "test" negotiations to discuss whether anything had been accomplished which would point the way to a settlement of the entire crew consist dispute, and that, until this procedure was completed, the National Mediation Board would not terminate its services on the three railroads as to which proffers of arbitration had been made by the Board. It was agreed that these "test" negotiations would begin on September 13 on the following railroads: The Boston & Maine Corp., Atlantic Coast Line RR., Southern Ry. System, Chesapeake & Ohio Ry., Missouri Pacific Lines, and Union Pacific RR.

* * * * *

58. Although the BRT pursued a variety of tactics in the different negotiations, certain common patterns emerged from all the discussions. The BRT uniformly refused to recede from the sweeping proposal of a minimum crew consist of one conductor and two brakemen, although the carriers were willing to discuss areas of compromise. In general, the BRT refused even to discuss the issues with respect to mainline through freight assignments, although the agreement between Messrs. Luna and Edwards and me expressly

contemplated that all the issues raised by the parties' Section 6 notices would be discussed, and the notices on both sides included proposals affecting mainline through freight assignments. The BRT showed, by its refusal to consider the impact of the parties' proposals upon particular crews on each road, that the BRT was seeking a uniform national crew consist rule, despite assertions on other occasions that the issue of crew consist is essentially local. At no time was the BRT willing to discuss the possible terms of national guidelines to be applied in the settlement of the crew consist dispute, although Messrs. Luna and Edwards and I had clearly agreed that that would be the principal purpose of these test negotiations. The BRT rebuffed all efforts by the carriers to conduct the negotiations in terms of considering what revision, if any, might justifiably be made in the procedures and guidelines established by Award 282, or in the crew consists specified in agreements or special board awards made pursuant to Award 282. That the goal of the BRT was to abolish everything that was accomplished under Award 282 was shown by the consistent refusal to agree that the crew consist agreements and special board awards might be maintained, by the failure to advance any evidence to show that conditions since the making of these agreements and awards have changed in such manner as to justify revision of the consist of crews affected by the Award, and by such extreme recalcitrance as unwillingness to consider even a date which corresponded to the effective date of Award 282.

59. After the negotiations on the six carriers were recessed, there remained the last step of the procedure agreed upon by Mr. Luna, Mr. Edwards, and me in our Chicago meetings of August 29-30—the post-negotiation meeting between the three of us to discuss the results of the negotiations and the possible development of guidelines. * * * Mr. Edwards then told me that he had no choice but to terminate the services of the NMB on the three railroads, Atlantic Coast Line, Boston & Maine, and

Des Moines Union; and on October 4 the NMB did notify these carriers that its services were terminated.

* * * * *

61. After the NMB had terminated its services in the crew consist disputes involving the Atlantic Coast Line, Boston and Maine, and Des Moines Union, these three carriers on November 1, 1966, filed suit in the District of Columbia for declaratory and injunctive relief against the BRT. *Atlantic Coast Line RR., Et Al. v. Brotherhood of RR. Trainmen,* Civil Action No. 2908-66 (D. D.C.). These plaintiffs alleged in part that the BRT had failed to bargain in good faith and in accordance with the Railway Labor Act by refusing to permit national handling of the crew consist dispute. * * *

62. The BRT took the position in the *Atlantic Coast Line* case that local handling of the crew consist issue was essential because of the need for local rules to meet conditions prevailing upon each individual railroad, and also because conditions varied greatly from carrier to carrier and even from location to location on a single railroad. * * *

63. The District Court rendered its opinion in *Atlantic Coast Line* case on January 16, 1967. *Atlantic Coast Line RR. v. Brotherhood of RR. Trainmen,* 262 F. Supp. 177. It held that the Railway Labor Act required the Brotherhood to participate in national handling of the 1966 phase of the crew consist dispute and that, because the Brotherhood had refused to do so, it had not exhausted the procedures of the Act and could not engage in the threatened strikes. 262 F. Supp. at 189. * * *

64. The BRT appealed this decision to the District of Columbia Circuit, and that Court on September 6, 1967, reversed the trial court. 383 F.2d 225. * * * The controversy over national handling ended finally on January 15, 1968, when the Supreme Court denied *certiorari.* 389 U.S. 1047.

65. Shortly thereafter, in early February, 1968, the BRT struck the Atlantic Coast Line, the Missouri Pacific,

and the Texas and Pacific railroads, whose crew consist dispute with the BRT had been released from mediation. Consequently, on February 9, 1968, these three roads and the Southern Railroad, whose dispute with the BRT had also been released by the Mediation Board, signed an agreement with the BRT in Jacksonville, Florida, to settle the crew consist dispute on those carriers. The "Jacksonville Agreement," as it has been called, called for immediate restoration of 50% of the crews which these carriers had reduced pursuant to the Award of Arbitration Board No. 282, and for further immediate negotiation over the remaining 50%. If within 34 days the parties failed to agree on a disposition of the remaining 50%, the parties were again relegated to self-help—that is, the BRT could strike, and the carriers could implement their proposed rules. The ultimate result was the restoration of all but a handful of crews on these carriers to a one-and-two basis.

66. In the wake of the Jacksonville settlement, agreements were signed on a number of other carriers. As I had by that time retired as Chairman of the National Railway Labor Conference, I cannot speak with personal knowledge respecting the negotiations that led to these agreements, except to the extent indicated in the following paragraphs of this Affidavit. My understanding, however, is that the agreements on these other carriers were substantially identical to the Jacksonville agreements—that is, the pattern was the casting aside of the scores of arbitration awards and agreements made pursuant to P.L. 88-108 and the restoration of all but a token number of crews to a one-and-one basis. If that is so, as I believe it to be, then, based upon my lengthy experience in these matters, my firm opinion is that these carriers entered into such agreements not out of conviction that they represented a just resolution of the controversies, but out of a fear of exercise by the BRT of the "whipsaw" strike tactics it had employed against the carriers that entered into the Jacksonville agreement.

67. Some railroads resisted to the point of strike. During 1968 the National Board released the crew consist disputes with the BRT on three carriers—the Chicago Belt, the Illinois Central, and the Louisville & Nashville. The BRT thereupon again put into play its "whipsaw" tactics. In July the BRT struck the Chicago Belt, and in November it struck the Louisville & Nashville, both strikes ending only with the appointment of Emergency Board No. 172 by President Johnson on November 6th. When Emergency Board No. 172 held hearings in Washington, I testified on behalf of the three carrier parties, and I later assisted the carriers in mediation sessions with the BRT conducted by the members of the Emergency Board after the hearings were closed.

68. The Report of Emergency Board No. 172 urged the parties to resume bargaining over their respective crew consist proposals. As prior public agencies had done—the Presidential Railroad Commission, Emergency Board No. 154, Arbitration Board No. 282—this Board recommended the adoption of overall guidelines to govern proper crew size determinations and then the application of those guidelines on a local basis to particular crew assignments. * * *

69. On December 23, 1968, shortly after Emergency Board No. 172 had issued its Report, BRT President Luna and I met at my request at the Union League Club in Chicago. We discussed our previous exploratory talks in Washington after the close of hearings by Emergency Board No. 172, but we could not make any progress. Later in our discussion Mr. Luna stated unequivocally that a settlement of the crew consist dispute on these carriers could not be effected unless the railroads accepted the conditions of the so-called Jacksonville settlement. I told him in response that I did not think that that position met the test of good faith bargaining, especially in the light of his statements made on many occasions that any settlement arrived at locally which his local people could live with would be acceptable to him. I then asked Mr. Luna if I

was free to tell the three carriers that his position was that any settlement which did not conform in almost exact detail to the Jacksonville settlement would be unsatisfactory to him and that he would not permit his local representatives to settle on that basis. Mr. Luna said that I was at liberty to tell the three roads that that was his position.

70. Thereafter, on January 13, 1969, the BRT struck the Louisville & Nashville again without notice. Although the strike was temporarily restrained by the United States District Court for the Middle District of Tennessee, on February 10, 1969, the railroad signed an interim agreement similar to the first phase of the Jacksonville pattern agreement which I have mentioned above, and on May 26, 1969, a final crew consist agreement which was also similar to the Jacksonville agreement. On or about April 3, 1969, a final agreement was made on the Chicago Belt which conformed to the Jacksonville Agreement. Then on April 8, 1969, the BRT also struck the Illinois Central without notice; and on April 13 this carrier too signed an interim agreement similar to the first phase of the Jacksonville pattern.

[Subscription and notarial certificate omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

AFFIDAVIT OF JAMES R. WOLFE ON BEHALF OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY

James R. Wolfe, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the Vice President - Labor Relations of the Chicago and North Western Railway Company * * *

2. The affidavit of my father, Mr. James E. Wolfe, formerly the Chairman of the NRLC, on behalf of the C&NW recites the general history of the crew consist dispute since

its inception in the 1950's. (Prior to that date, trains in this country were generally manned by an "engine crew" consisting of an engineer and a fireman, and a "train crew" consisting of a conductor and two brakemen.) My affidavit intends to set out the facts relating to the crew consist dispute, *i.e.*, the dispute relating to the size of "train crews", with the former Brotherhood of Railroad Trainmen (hereinafter referred to as the "BRT"), and its successor, the United Transportation Union (hereinafter referred to as the "UTU"), as the dispute has developed on the C&NW since the rendition of the Award of Arbitration Board No. 282 in the fall of 1963. Prior to that time the C&NW had always been a part of the national dispute with the BRT and other unions over crew consist, had served the November, 1959, carrier notices under Section 6 of the Railway Labor Act proposing to commit the issue of train crew size to managerial discretion, had been served with the BRT's and other unions' Section 6 notices of September, 1960, proposing a uniform national rule requiring a minimum train crew of one conductor and two brakemen on all trains, had participated in the proceedings before the Presidential Railroad Commission and Emergency Board No. 154, and was a party before Arbitration Board No. 282.

* * *

3. As is explained in Paragraph 18 of the Affidavit of James E. Wolfe, Section III of the Award of Arbitration Board No. 282 relating to crew consist prescribed a national procedure for both carriers and unions to follow for changing the size of existing train crews on individual railroads and moreover laid down national guidelines to be followed locally in determining the appropriate size of particular crews on individual railroads. Pursuant to the Award, a party desiring a change in the number of men on a given crew or on a number of crews could serve written notice on the other party designating the crews sought to be changed. The Award then required the parties to negotiate on the matter promptly. If they agreed to increase or decrease the number of men in the train crew, that ended the controversy. (Award § III(A)). If agreement failed,

the party proposing the change could submit the issue to binding arbitration by a special board of adjustment created on that railroad. (Award § III (B)).

4. After the rendition of the Award of Arbitration Board No. 282 in November, 1963, and before it became effective in January, 1964, the C&NW reviewed and studied the work of its train crews in both road and yard service to determine whether the Award's guidelines authorized changes in crew size. The C&NW conducted studies in each of the individual districts into which the carrier is divided for purposes of labor relations matters. Thereafter the carrier served notices under Section III(A) of the Award of Arbitration Board No. 282 upon those organizations which represented brakemen and helpers in road and yard service on the C&NW, *i.e.*, the BRT in most instances and the Switchmen's Union of North America ("SUNA") in one. (Both the BRT and the SUNA have since merged with two other labor organizations into the UTU, but there has been no significant change in the personnel of these organizations involved in this dispute.) By these notices the carrier generally asked that train crew reductions be made in all yard crews from a minimum consist of one conductor (generally denominated "foreman" when in yard service) and two brakemen ("helpers" in yard service) (*i.e.*, "1 and 2") to a consist of one conductor and one brakeman (*i.e.*, "1 and 1"). In branch line road service where Award 282 also established procedures for crew changes, the carrier's notices generally proposed reductions from a crew of "1 and 3" to a crew of "1 and 1", or from a crew of "1 and 2" to a crew of "1 and 1." The negotiations which followed between the C&NW and the BRT and SUNA with some exceptions failed to result in agreements to dispose of the crew consist dispute.

5. Consequently, following the breakdown of negotiations over the C&NW crew consist notices in the carrier's several districts, a number of special boards of adjustment were created to arbitrate the dispute pursuant to the pro-

cedures established by Section III(B) of Award 282. These special boards, composed of one carrier member, one union member, and a neutral, held hearings for the taking of oral and written evidence, considered written briefs, and neard oral argument. Much attention was paid by both the parties and the neutral to the issues of safety and work burden—whether the carrier's proposed crew reductions would result in unsafe working conditions for the men or place an undue work burden upon them. In nearly all cases, the special boards resolved these issues of safety and work burden, along with the other guidelines specified by the Award of Board No. 282, in favor of permitting the reductions sought by the carrier. * * *

6. In three instances the carrier's crew reduction proposals were settled by agreement with the BRT * * *. In addition, the Chicago Great Western Railway Company, which has since been merged into the C&NW, made a crew consist agreement pursuant to the procedures of Award No. 282 with the BRT on August 6, 1964. * * *.

7. The Affidavit of James E. Wolfe has described in general the efforts of the BRT to undo the accomplishments of both the Award of Arbitration Board No. 282 and the special board of adjustment awards and crew consist agreements which followed. The C&NW was not excepted. On July 3, 6, and 7, 1965, the BRT served upon the C&NW and upon the former Chicago Great Western the union's new Section 6 notices which proposed a uniform rule requiring a crew consist of "1 and 2" on virtually all road and yard crews on the carriers' systems. On some road crew assignments the BRT asked for a consist of "1 and 3." Copies of the notices served by the BRT upon the "C&NW Proper" District on July 6, 1965, are attached hereto as Exhibits A (notice relating to road service) and B (notice relating to yard service). These demands, of course, if agreed to by the carrier, would nullify completely the manning reductions—roughly 200 jobs—which the abovementioned awards and agreements accomplished.

8. When the nation's rail carriers took the position that the BRT's notices were barred by the Award of Arbitration Board No. 282, the union invoked the services of the National Mediation Board. The Board docketed the disputes over the notices served by the BRT on the then four districts of the C&NW on October 4, 1965, as NMB Case Nos. A-7523 ("C&NW Proper" District), A-7524 ("M&StL" District), A-7525 ("CStPM&O" District), and A-7526 ("L&M" District). Subsequently the dispute over the notice served by the BRT on the former Chicago Great Western was docketed by the NMB as Case No. A-7645. Nevertheless, no conferences or mediation sessions were held on any of these BRT notices in 1965.

9. On or about December 24, 1965, most of the railroad industry, including the C&NW as to its several districts, served the national Section 6 notices upon the BRT. With these notices the C&NW proposed the elimination of all existing crew consist rules and the adoption of a new rule which would commit the matter of crew size to managerial discretion, *i.e.*, the same proposals which the railroad industry served in 1959, and which were finally disposed of by the Award of Board No. 282. A copy of the C&NW's notice served on the "C&NW Proper" District is attached hereto as Exhibit C.

10. The carrier's Section 6 notice of December 24, 1965, also proposed that if the parties could not settle the crew consist dispute in initial conferences on the property they would commit the dispute on the C&NW, along with those pending on the other railroads, to national handling in accordance with established practices in the railroad industry. However, the BRT responded on December 12, 1965, by agreeing to meet in conference on the carrier's notices, but refusing to engage in national handling. * * *

11. When the parties met in conference on January 18, 1966, they did not discuss the merits of the crew consist dispute. Instead the BRT insisted that the purpose of the meeting was only to discuss the carrier's notices and that

the union would refuse to handle the whole crew consist dispute on this railroad together. * * * The BRT also again refused to enter into national handling of any phase of the crew consist dispute * * *.

12. The carrier's next conference on the crew consist issue was held only with the General Chairman of the carrier's "Milwaukee Industrial" District on March 28, 1966, again without discussion of the merits. BRT General Chairman Richardson mentioned the Luna-Saunders Agreement as "setting a precedent" for disposition of the entire dispute, thereby suggesting that the dispute which the BRT had previously said could be handled only on a local basis should nevertheless be resolved by adopting a uniform national rule of "1 and 2."

13. The carrier met with the representatives of the BRT again on June 28, 1966, at which time BRT General Chairman Spiegel ("C&NW Proper" District) reiterated the union's position that the

> ". . . carrier's notice and the organization's notice are two separate issues and will be handled separately."

When the carrier representative stated that he understood the purpose of the conference to be discussion of the notices and proposals of both parties, Mr. Spiegel again refused to discuss the carrier's demands concurrently with the BRT's. Then Mr. Spiegel announced that he was free to make an agreement himself on this railroad, indicating that he was not bound by any national determination of a settlement, and in this regard he stated that he was not just "going through the motions." However, in nearly the next breath Mr. Spiegel urged upon the carrier the adoption of the Luna-Saunders Agreement and its uniform "1 and 2" rule. The parties then recessed with an informal agreement to make separate studies of crew consist needs on individual jobs.

14. In March of 1968, the C&NW decided to try a new approach in an effort to arrive at a compromise. Basically, that approach involved offering to share with the employees

the savings accomplished by the elimination of wasteful labor costs. Accordingly, the C&NW proposed that the parties enter into an agreement under which the basic daily rate of brakemen working on "1 and 1" crews would be increased by $3.45. This would have meant, on the average, an annual wage increase of around $1,000 for each brakeman working on such crews. The union, however, promptly and unequivocally refused to bargain over that proposal and vigorously protested against any further discussion along those lines. On March 14, 1968, union General Chairman Maloney wrote to the C&NW and stated:

> "We are not willing to enter into negotiations on such a proposal, and you are hereby advised that same is not acceptable."

The C&NW therefore, in order not to introduce further tension into the negotiations, refrained from pressing its proposal. Later, I learned that in strike injunction litigation brought by another railroad, the UTU's President, Mr. Charles Luna, testified that the union's negotiators were bound by a UTU convention action not to discuss any carrier proposal to compromise the dispute on any basis that would include the payment of additional wages to employees. Thus, he said on cross-examination:

> "Q. Mr. Luna, you testified your general chairmen are perfectly free to make whatever agreement they wish on the L&N, is that right?
>
> "A. With the exception of taking money. We have convention action, which is the governing body of this organization. That is against selling a man's job for x number of dollars" (Transcript of preliminary injunction hearing, p. 350, *Louisville & Nashville RR. v. United Transportation Union*, Civil Action No. 5784 (M.D. Tenn. 1969)).

Moreover, Mr. Luna, in statements printed in the union's newspaper, the *Trainmen News*, proclaimed his unalterable opposition to negotiations involving consideration of a compromise based upon increased compensation—compensation that he called "Judas Money." (Trainmen News, vol. 22,

No. 13, p. 1 (March 23, 1968); op. cit., vol. 22, No. 14, p. 1 (March 30, 1968)).

15. The parties did not meet again on crew consist until March of 1968 when BRT President Charles Luna and C&NW Chairman Ben W. Heineman and President Larry S. Provo discussed the crew consist dispute briefly. At that time Mr. Luna argued that "1 and 2" crews were more economical than smaller crews and that the carrier was actually losing money by refusing the union's demands for larger crews. Messrs. Heineman and Provo offered to study the economics of crew size on this railroad and furnish the results to the BRT. When completed this study showed clearly the carrier's savings by operating with small crews. On May 16, 1968, pursuant to an agreement between the BRT's C&NW General Chairman Maloney and me that we would make a real effort to sit down and settle the crew consist dispute, other carrier representatives and I met with General Chairman Maloney on the "C&NW Proper" District, the largest of the carrier's districts. The results of the carrier's economic studies were first handed to Mr. Maloney, together with an offer to discuss them and answer questions about them. Mr. Maloney did not then look at the studies, and no representative of the BRT ever mentioned them again except upon one later occasion when Mr. Maloney simply remarked that he did not understand them. In answer to that remark we offered to explain the study, but Mr. Maloney never indicated a willingness that we do so. During most of the conference of May 16 we identified all the existing jobs which were being operated on the "C&NW Proper" District with "1 and 1" crews and then agreed that at subsequent meetings we would study yard jobs first, then road jobs. Nevertheless, before recessing Mr. Maloney remarked that all Chicago Terminal jobs would have to be operated with "1 and 2" crews.

16. At the next three conferences the parties considered yard jobs. On June 12, 1968, Mr. Maloney discussed a number of yard assignments on the "C&NW Proper" District and commented on some jobs which in his opinion

would have to be restored and others which could remain at "1 and 1." He conceded that 4 or 5 jobs could continue to be worked with one helper. Finally, he insisted again that all Chicago Terminal crews must be worked with "1 and 2," and that "there was not even any sense in discussing them". More discussion of yard assignments followed at the conference of June 20, 1968, at the conclusion of which Mr. Maloney stated that of some 80 yard jobs then being operated in the "C&NW Proper" District with "1 and 1" crews only 6 could continue with "1 and 1," and of these two were not then in existence but had been abolished earlier. At the third meeting on July 17, 1968, the carrier representatives reviewed our notes on about one-half the yard assignments on the "C&NW Proper" District and discussed reasons why these assignments could be operated safely and efficiently with small crews. The remainder were to be discussed at our next meeting.

17. At the conference on August 6, 1968, Mr. Maloney was joined by BRT Vice President Francis Tuffley. After we had finished discussing "C&NW Proper" District yard assignments on behalf of the carrier, I said that many road assignments on branch lines in that district ought to remain "1 and 1" and that also many mainline jobs should be reduced to "1 and 1." Mr. Tuffley, however, did not answer me but, rather, put on the table a number of crew consist agreements which the BRT had entered into with other railroads. In the conversation that followed Mr. Maloney indicated that what was "good enough for those railroads" should be good enough for the C&NW. Mr. Tuffley then asked me how my railroad could justify a different agreement. When I said that I could not follow these other agreements since the C&NW had proved the effectiveness of "1 and 1" crews by using them continuously for four years, the BRT representatives began to pack up their papers preparatory to leaving the room. Mr. Tuffley said it was clear that we were "getting nowhere," that the Mediation Board ought to be brought in, and that the C&NW quite clearly did not intend to make a settlement

like those all the other railroads had made. I again protested that we had not discussed any of the road jobs in the "C&NW Proper" District which were now operating with "1 and 1" crews, nor had we discussed any of the "1 and 2" crews which the carrier wished to reduce pursuant to our Section 6 notice. The meeting ended there.

18. On the following day, August 7, 1968, Mr. Maloney called me to agree that we ought to discuss road jobs in his district and that he would later call for another conference in three or four weeks. Mr. Maloney's agreement that the road jobs should be discussed and to postpone requesting the services of the Mediation Board coincided with the BRT strike of the Chicago Belt over crew consist. Mr. Maloney did not call for another conference date, and I did not discuss crew consist with the BRT again until brief conversations with Mr. Maloney took place in October and in January when we agreed only to defer our discussions. Then on April 14, 1969, a day after the Illinois Central Railroad Company had entered into a crew consist agreement with the union to settle a strike on that carrier, Mr. Maloney called to tell me that BRT (now UTU) President Luna "was after [him] to get moving on crew consist." I agreed to another conference for April 22, 1969.

19. Much of the conference on April 22, 1969, was devoted to a UTU demand concerning changes in rules in the carrier's suburban service, the union chiefly wanting the carrier to agree to a five-day work week. However, the subject of crew consist was also discussed. The quotations set out below are taken from my conference notes; and if they are not exactly verbatim, they are at a minimum substantially accurate.

20. Mr. Maloney for the UTU first stated that his "hands were not tied" on the crew consist issue and that he wanted to try to settle both that dispute and the one over suburban service together. Later, however, he added that any settlement along those lines would require the approval of UTU national Vice President Tuffley, since the Grand Lodge

was "calling the shots" on crew consist. Then when asked whether he thought all "1 and 1" jobs should be restored, the following discussion took place:

> "[Maloney] No, I believe that the crew consist agreements which have come through on other railroads have shown between 70% and 80% of the jobs returned to service and I would think around 72% of the jobs should be restored.
>
> "[Wolfe] I assume from what you say, that you are not agreeable to any deviation from those national percentages in disposing of our crew consist notices.
>
> "[Maloney] That's right. I am going to have to get the national average of jobs returned to service."

Mr. Maloney then proposed that a certain number of these "1 and 1" jobs might not be restored in return for carrier concessions in the suburban service dispute:

> "[Wolfe] Do you then mean that we could restore that percentage of jobs and then again remove some of those jobs because of the suburban service Five Day Work Week?
>
> "[Maloney] No, I must dispose of the entire crew consist issue once only. The original disposition must take into account that certain jobs are not restored and that a suburban service Five Day Work Week Agreement will be placed in effect instead. A somewhat similar agreement was made on the L&N where the crew consist issue was used to resolve other local bargaining problems on the property."

Later, there was this exchange:

> "[Maloney] We want [enumerates demands in suburban service]. [In return] we will yield on the number of crew consist jobs returned in the Chicago area sufficient to cover all this cost.
>
> "[Wolfe] What about the matter of crew consist in road service? We haven't talked about that yet.
>
> "[Maloney] The general trend of the agreements around the country has been that road service will be manned one and two.

"[Wolfe] You mean you don't want to talk about road service?

"[Maloney] No, except in the Chicago area.

". . . .

"[Wolfe] How are we going to settle the road service subject?

"[Maloney] We will have to have one and two on these jobs. My proposal is that all jobs on the road be manned one and two, except in the Chicago area.

"[Wolfe] What about our proposal on main line way freights?

"[Maloney] This has been set aside in other handling.

"[Wolfe] Then you are not willing to talk about crew consist on the road, except in the Chicago area?

"[Maloney] That is right, except in Chicago."

21. At the parties next conference on April 30, 1969, Mr. Maloney started off by saying:

"[Maloney] I will be very candid. I was low man on the totem pole on crew consist on the main line railroads. IC [Illinois Central] and C&NW were the last, and it was decided they should not both be tackled at once. IC was first. Now that the IC has settled I am being questioned by Grand Lodge Officers on where I stand. I can only get by so long, and it will soon be necessary to get a mediator. Grand Lodge officers tell me I am first-out to settle this or get a mediator. I don't believe we will encounter any difficulty with other General Chairmen [having them come in to the discussions] because we are not going to deviate from the national average."

After discussion on a range of subjects involving the "C&NW Proper" District—but not individual jobs—Mr. Maloney said:

". . . I don't believe it will be too difficult to reach agreement. This file should be enough.

"[Wolfe] What is in that file?

"[Maloney] It contains all of the crew consist agreements in the country. The percentages established will have to be followed here. You didn't think I would agree on lower percentages here, did you?

". . . .

"[Maloney] The pressure on me to make a crew consist agreement is very strong."

The meeting ended after a discussion of other unrelated matters.

22. The next conference, on May 9, 1969, was attended by UTU (formerly BRT) general chairmen for the "C&NW Proper," "L&M," "M&StL," and "CStPM&O" Districts. This conference therefore represented the first time since the prefatory meetings of January 18, 1966, and June 28, 1966, that union representatives from the "CStPM&O," "M&StL," and "L&M" Districts had conferred with the carrier on crew consist. Mr. Maloney stated that the C&NW was the last railroad to settle with the UTU because the union recognized that it could not strike both the Illinois Central and the C&NW at the same time. Now he said, "Charlie" Luna was chaffing at the bit. Maloney next stated it was not necessary for him to discuss manning needs on individual jobs: he had discussed "C&NW Proper" yard jobs informally with the C&NW, and there were plenty of precedents now. General Chairman Cardinal representing the "CStPM&O" District then said that he could see no sense "sparring" around, that it would be "ridiculous" for him to agree to anything different from the crew consist agreements on the Milwaukee Road and the Great Northern railroads where the men work side-by-side with C&NW employees in certain terminals. Mr. Maloney stated that if he entered into an agreement restoring only 40% of the present "1 and 1" jobs he "would be in trouble in Cleveland." He also said that if the carrier and the union considered and discussed all the individual jobs involved in this dispute they "would be [there] until next

istmas." Mr. Maloney then withdrew the offer to mpt to settle crew consist in connection with a settle- t on suburban service. I later stated that while Mr. oney and I had discussed all the yard jobs, we hadn't ussed the road jobs. Mr. Maloney replied first that all road jobs would have to be restored to "1 and 2," ept pile drivers (a very small number of jobs) and sec- , that consideration of the "1 and 1" road jobs would a long time and that he wouldn't agree to a job-by- study on them. Later he stated that he did not want e pinned down on what he will insist on in road serv- I finally attempted to describe Mr. Maloney's position ollows:

> "You do not want to go over the road assignments on a job-by-job basis, and you expect that all of them must be restored because of the IC and L&N agreements."

Maloney responded by saying that he expected all road to be restored, not because of the IC or L&N, but use of productivity. Then he added, however, "All of others have gotten together and why can't we?" There no discussion or even a listing during this conference ndividual jobs on the "L&M," "M&StL," or "CStPM&O" ricts, although I advised the union representatives that should not terminate on-the-property negotiations until ussions for the whole C&NW system were complete.

3. The conference of the morning of May 15, 1969, held with General Chairman Cardinal of the "CStPM&O" rict only. The parties simply identified the jobs now king "1 and 1" without any discussion of their man- requirements. Then Mr. Cardinal stated positively that he jobs so identified had to be restored to "1 and 2," nting out to me that the Milwaukee Road and the Great thern had restored all their crews. I asked if Mr. Cardi- meant that all the "1 and 1" jobs on his district had to estored to "1 and 2," not because the men were needed, because other railroads put them back. Mr. Cardinal replied that he wasn't saying just that, but a second

later he answered that maybe he was saying just that. When I then asked if Mr. Cardinal thought it would be a "waste of time" to discuss all the jobs, he answered that, to be honest, he thought it was. Nevertheless, I proceeded to to review some yard jobs in the "CStPM&O" District, but at the end of that review Mr. Cardinal announced that he wanted all jobs restored to "1 and 2" and that he must have them restored because, in his words, "the other railroads have put the men back." When asked again if he wanted to discuss a particular set of jobs he refused, replying that he wanted them all restored. Later when I argued that the operational needs of the railroad did not justify "1 and 2" crews, Mr. Cardinal answered that the jobs had to be restored no matter and added: "Why kid ourselves?" I finally referred to some road jobs in the "CStPM&O" District, and Mr. Cardinal refused to discuss the manning requirements on any. At one point he said the union required all the jobs restored in the Twin Cities area in view of the Milwaukee Road and Great Northern settlements.

24. The conference of the afternoon of May 15, 1969, was attended only by UTU General Chairman Stahley of the "Chicago Great Western" District which represented the first time that a union representative had met with the C&NW to confer on the crew consist dispute on that district. After much general background discussion, we merely identified without any discussion all the "1 and 1" jobs in the "CGW" District (which were all the jobs in that district with certain exceptions at Oelwein Yard and some main line assignments). Although Mr. Stahley at first indicated a willingness to discuss individual jobs, he then excluded those at the Kansas City Missouri terminal where, in his words, "the agreements of the Milwaukee Road, Kansas City Southern Railway, and others had to be followed." When I protested, Mr. Stahley replied that those agreements were the only guidelines he could think of. Moreover, he further stated that UTU Vice President Tuffley had instructed him that the C&NW had to conform to the same disposition reached on other railroads. Thereupon Mr.

Stahley conceded that "as a practical matter" he could "not agree to anything else" and declined to enter a job-by-job discussion until he learned whether or not the dispute on his district (the "CGW" District) would be included in mediation sessions which the Mediation Board had announced were forthcoming.

25. The conference of May 15, 1969, marked the end of the on-the-property conferences. During those negotiations, the union at least listened to the carrier's position (although their representatives always emphasized that eventually any agreement had to conform to the national pattern) relating to individual yard jobs in the "C&NW Proper" District, but for yard crews in the four other districts and for road jobs in all C&NW Districts, the union refused to even hear a presentation of the carrier's position. In fact, although the union representative of the "C&NW Proper" District met with the carrier a total of nine times (January 18 and June 28, 1966; June 12, June 20, July 17 and August 8, 1968; and April 22, April 30 and May 9, 1969) during which meetings the parties discussed yard jobs in that district but not road jobs, meetings with representatives of the other districts on the C&NW system were only perfunctory: (1) the General Chairmen of the "M&StL" and "L&M" Districts appeared at the prefatory meetings of January 18 and June 28, 1966, when procedures were discussed and at the general meeting of May 9, 1969, but at no time did they discuss the manning requirements of the individual jobs on their districts or, for that matter, even listen to a presentation of the carrier's position on those jobs, (2) the General Chairman of the "CStPM&O" District also appeared at the prefatory meetings of January 18 and June 28, 1966, and the general meeting of June 9, 1969, and additionally at a meeting on the morning of May 15, 1969, but the only reference to individual jobs on the "CStPM&O" District occurred at the May 15 morning meeting when the parties identified the jobs involved but did not discuss their manning requirements, and (3) the General Chairman of the "CGW" Dis-

trict appeared only once, on the afternoon of May 15, 1969, at which time the carrier only listed the jobs involved but did not have time to even present its position on manning requirements for those jobs.

26. Mediation under the auspices of the National Mediation Board commenced on June 2, 1969, with the parties meeting separately with the mediator. When the parties met on June 3, 1969, I pressed for a recess in mediation in order to give the carrier (and the UTU if it wished) time to prepare studies. My proposal met with resistence; and I was prompted to ask the UTU representatives what concrete evidence they had on the question of whether or not additional men were needed on crews. General Chairman Maloney responded in substance as follows:

> ". . . [I]n the country as a whole it can be seen what happened. On one railroad 600 jobs were worked one and one and all are back on [*i.e.*, being operated at "1 and 2"], and on another railroad 450 were off and all but eight are back on. . . . If we do this study, where will we end up? . . . No matter how many time-studies may have been made, other railroads have been settling for an average of 90% [of the crews at "1 and 2"]. . . . Time-studies could not have played a very important role in these dispositions."

When I replied that we were now talking about the C&NW and not about other carriers, Mr. Maloney's answer was that

> "the Burlington, the Milwaukee Road, and the Great Northern have returned their crews to a "1 and 2" consist and the [C&NW] crews should now be returned to a "1 and 2" consist the same as these other railroads."

When I again pressed for the study of individual jobs, Mr. Maloney stated that he was

> "of the firm belief that time-study or no time-study, the organization would seek and gain an agreement by saying: 'here is what the Milwaukee, the CB&Q, and the Great Northern have done, and this is what the [C&NW] is going to have to do.' "

UTU Assistant Vice President Moore added that President Luna had stated that in a single yard all the jobs working side by side must be returned to a "1 and 2" crew consist. Later, after lunch, at the suggestion of the mediator the parties did agree to a two-week recess so that job studies could be made. Nevertheless, Mr. Moore then made the statement that he

> "presume[d] that the study [was] for the carrier's benefit and not for any purpose of the employees, since [he] do[es] not intend to change [his] position in any way relative to insisting on a return to a "1 and 2" crew consist."

Moreover, Mr. Moore stated that he does not think that the C&NW is any different from the other railroads which have already agreed to return their employees to a crew consist of "1 and 2."

27. Mediation sessions resumed on June 18, 1969, with a discussion of the methods which the carrier had used in conducting its job studies. General Chairman Maloney asked at the start if all the time that was injected into these studies wasn't "pointless," because

> ". . . on all of these various railroads across the country agreements eventually resulted which put the men back to work regardless of the studies."

Mr. Maloney then made a written proposal to settle the dispute. In general, the proposal provided that all crews on the railroad be operated at "1 and 2." Mr. Maloney stated –without giving any details–that this proposal was based upon "a comprehensive study of [his] own relative to crew consist." Moments later he asked the carrier to make a counterproposal and said that he did "not give a damn about the carrier's time and motion study."

28. The meeting of the parties on June 20, 1969, was brief. It was not attended by all the union's representatives, and the only subject discussed was the carrier's latest proposal. This called for restoration of five yard and 2 branch line jobs to "1 and 2" status, for further reductions

of other yard and branch line crews to "1 and 1," and reductions to "1 and 1" in mainline through freight in accordance with the carrier's long-standing proposal that reductions be made in that area of the C&NW's operations.

29. On June 24, 1969, the carrier received the UTU's next proposal through the mediator. This called for a "1 and 2" consist on all the carrier's crews except for 8 yard crews and 3 branch line road crews. On June 25, the parties met again and discussed at length the union's proposal. I gave all my reasons why the carrier could not accept such a return to larger crews, and Mr. Maloney responded in a way which once again demonstrated the union's hostile attitude toward discussing crew consist on the merits:

> "I will not sit here and argue whether or not these men are needed. I believe they are needed."

I brought up the subject of mainline through freight service and said that in my view the Award of Arbitration Board No. 282 did not go far enough in resolving the crew consist question because it excluded consideration at that time of reduction in mainline. Again Mr. Maloney's response summed up the union's attitude; for he said that while the parties were not then discussing the carrier's proposal.

> "when we do get to that proposal, the organization is definitely not going to agree to any change in crew consist on mainline or through freight jobs."

In other words, the union just wasn't going to bargain at all on the C&NW's proposals for reductions in mainline. When the carrier's proposal did come under discussion, Mr. Maloney said that if he accepted that proposal he would be going

> "far beyond his responsibility as General Chairman in this case."

The meaning of Mr. Maloney's words was clear to me: He did not have the authority from his national office and from President Luna to agree to any settlement which retained a substantial number of yard and branch line crews

at "1 and 2" or which granted any of the reductions sought by the carrier's proposals in mainline. After another brief discussion this meeting ended.

30. Four further meetings were held by the parties with a mediator between June 26 and July 2, 1969. These meetings in the main consisted of arguments over the "pros and cons" of the different proposals, and little progress was made toward reaching an agreement. At all times the union representatives insisted that the C&NW would have to make an agreement like the other carriers on which there have been settlements on the crew consist issue, and especially like the agreements reached on the Milwaukee Road; the Great Northern; and the Chicago, Burlington & Quincy. At one point in the parties' meeting on June 30, 1969, BRT General Chairman Maloney seemed to sum up the union's final position:

> ". . . [T]he employees on the [C&NW] are going to insist on an agreement comparable to the agreements obtained by their fellow workers on other railroads in the mid-west."

31. On July 2, 1969, the mediator announced that in his view mediation had failed and that he was so reporting to the Mediation Board. No further mediation sessions were held. In October, 1969, the Mediation Board proffered arbitration to the parties. The C&NW promptly accepted, but when the union declined, the Board terminated its services in this dispute on October 16, 1969.

32. On November 11, 1969, conferences resumed at my request with UTU Vice President Francis Tuffley and the various General Chairmen present to represent the union. When this meeting opened, I first inquired of Vice President Tuffley if the union intended to delay their strike. Mr. Tuffley responded that the union would not strike as long as conferences continued to progress, but that he did not envision conferences continuing beyond one week. During the next seven days the parties met in the offices of the C&NW, during which time we identified the crews

involved in this dispute and discussed our positions. At no time, however, did the union alter its refusal to even consider the carrier's Section 6 notice on main line crews or in any way deviate in its offers to dispose of the dispute from the agreement results made with other railroads.

[Subscription and notarial certificate omitted in printing.]

EXHIBT A

General Grievance Committee
BROTHERHOOD OF RAILROAD TRAINMEN
Chicago & North Western Railway

Chicago, Illinois
July 6, 1965

Mr. T. M. Van Patten
Director of Personnel
C. & N. W. Railway
Chicago, Illinois 60606

Dear Sir:

The undersigned, representative of the Road Trainmen of the Chicago & North Western (Proper) Railway Company, under existing agreements between management and the Brotherhood of Railroad Trainmen, has been authorized under the laws and rules of procedure of the organization, to submit to you notice of desire to change, effective January 26, 1966, the said agreements as set forth below:

> Consist of crews in road service: "Effective January 26, 1966 a rule shall be inserted into the respective agreements between the parties applying to Brakemen (trainmen) which will provide that crews in road through freight service shall consist of not less than two (2) Brakemen (trainmen).

UTU Assistant Vice President Moore added that President Luna had stated that in a single yard all the jobs working side by side must be returned to a "1 and 2" crew consist. Later, after lunch, at the suggestion of the mediator the parties did agree to a two-week recess so that job studies could be made. Nevertheless, Mr. Moore then made the statement that he

> "presume[d] that the study [was] for the carrier's benefit and not for any purpose of the employees, since [he] do[es] not intend to change [his] position in any way relative to insisting on a return to a "1 and 2" crew consist."

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In other words, the union just wasn't going to bargain at all on the C&NW's proposals for reductions in mainline. When the carrier's proposal did come under discussion, Mr. Maloney said that if he accepted that proposal he would be going

> "far beyond his responsibility as General Chairman in this case."

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[Subscription and notarial certificate omitted in printing.]

EXHIBIT A

General Grievance Committee
BROTHERHOOD OF RAILROAD TRAINMEN
Chicago & North Western Railway

Chicago, Illinois
July 6, 1965

Mr. T. M. Van Patten
Director of Personnel
C. & N. W. Railway
Chicago, Illinois 60606

Dear Sir:

The undersigned, representative of the Road Trainmen of the Chicago & North Western (Proper) Railway Company, under existing agreements between management and the Brotherhood of Railroad Trainmen, has been authorized under the laws and rules of procedure of the organization, to submit to you notice of desire to change, effective January 26, 1966, the said agreements as set forth below:

> Consist of crews in road service: "Effective January 26, 1966 a rule shall be inserted into the respective agreements between the parties applying to Brakemen (trainmen) which will provide that crews in road through freight service shall consist of not less than two (2) Brakemen (trainmen).

Crews in way-freight service shall consist of not less than three (3) Brakemen (trainmen) on the following main lines:

Between Chicago and Council Bluffs
Between Chicago and Elroy
Between Chicago and Milwaukee

Crews in suburban passenger service shall consist of not less than two (2) Brakemen (collectors)

Therefore, in accordance with the provisions of the Railway Labor Act, as amended, and current agreements covering rates of pay, rules and working conditions of the employees herein covered, you will please accept this as formal notice of our desire to change the said agreements as set forth above.

Please reply to this proposal in writing to the undersigned General Chairman within ten days, fixing date within the provisions of the Railway Labor Act when conference with you may be had for the purpose of discussing these matters.

Yours truly,

/s/ Norman Speigal
Chairman, G.G.C.

cc: Mr. Charles Luna

EXHIBIT B

General Grievance Committee
BROTHERHOOD OF RAILROAD TRAINMEN
Chicago & North Western Railway

Chicago, Illinois
July 6, 1965

Mr. T. M. Van Patten
Director of Personnel
C. & N. W. Railway
Chicago, Illinois 60606

Dear Sir:

The undersigned, representative of the Yardmen and Switchtenders of the Chicago & North Western (Proper) Railway, under existing agreements between management and the Brotherhood of Railroad Trainmen, has been authorized under the laws and rules of procedure of the organization, to submit to you notice of desire to change, effective January 26, 1966, the said agreements as set forth.

> Consist of crews in all yards, which shall provide that "Effective January 26, 1966, a rule shall be inserted in the respective agreements, between the parties applying to yard service employees, which will provide that train and yard crews in all classes of yard service, including Transfer, Interchange, Yard Work Trains, shall consist of not less than one (1) conductor (foreman) and two (2) brakemen (helpers).
>
> Yard crews employed at Proviso Hump Yard to consist of not less than one (1) conductor (foreman) and three (3) brakemen (helpers)

Therefore, in accordance with the provisions of the Railway Labor Act, as amended, and current agreements covering rates of pay, rules and working conditions of the employees herein covered, you will please accept this as formal notice of our desire to change the said agreements as set forth above.

Please reply to this proposal in writing to the undersigned General Chairman within ten days, fixing date within the provisions of the Railway Labor Act when conference with you may be had for the purpose of discussing these matters.

Yours truly,
/s/ Norman Speigal
Chairman, G.G.C.

cc. Mr. Charles Luna

EXHIBIT C

December 24, 1965

File 69-2-34-Trnm. C&NW
69-2-34-Ydmn. C&NW

WJF:a

Mr. N. Spiegel
14 East Jackson Boulevard
Chicago, Illinois 60604

Dear Sir:

This has reference to our previous correspondence concerning your purported Section 6 notices of July 6, 1965 relating to crew consist:

As I previously informed you, without waiving the carrier's position as to the prematurity and impropriety of your requests, the carrier reserved the right to file such proposals as it may consider appropriate for concurrent handling with your requests when considered appropriate to do so.

We hereby give notice, under our existing agreement or agreements and pursuant to the provisions of the Railway Labor Act, that we propose to revise and supplement such agreement or agreements in accordance with the proposals set forth in "Attachment A" appended hereto, such proposals to be considered and progressed concurrently with

your notices of July 6, 1965. It is suggested that the initial conference on the carrier's proposals be held at 10:00 a.m., Tuesday, January 18, 1966, at 400 West Madison Street, Chicago, Illinois, at which time we will also discuss the organization's proposals.

As a matter of information we have suggested the same time and place for conference with the other BRT General Chairmen relative to identical notices being served on them by the carrier for concurrent handling with proposals served by them which were similar to those forwarded with your letters of July 6, 1965.

Please acknowledge receipt of this notice and advise if the proposed time, date and place for holding the initial conference are agreeable to you.

In the event that we are unable to reach an agreement upon the organization's and carrier's proposals at such conference, we further propose that the matter be handled on a joint national basis. In accordance with established procedure which has been followed in the railroad industry on numerous occasions during the last fifty years, if an agreement is not reached in our conferences, this carrier will join with other carriers serving a like notice upon their employes represented by the Brotherhood of Railroad Trainmen in the creation of regional Carriers' Conference Committees which, in conjunction with the National Railway Labor Conference, will be authorized to represent it in progressing the matter to a conclusion. It is requested that you join with representatives of the employes on other carriers who are receiving like proposals in the creation of an Employes' National Conference Committee to negotiate to

a conclusion, in accordance with the provisions of the Railway Labor Act, the subject matter of these proposals.

Yours truly,

(Signed) T. M. Van Patten

BC: Mr. J. F. Griffin - See your Circular No. 229-5 of December 21, 1965.

T.M.V.P.

BBC: Messrs. S. C. Jones
L. S. Provo
J. J. Hillman

BBBC: Mr. B. W. Heineman

ATTACHMENT A TO EXHIBIT C

CONSIST OF CREWS

Consist of Road and Yard Crews

A. Eliminate all agreements, rules, regulations and practices, however established, applicable to any class or grade of train or yard service employes, which require the employment or use of

(i) a stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen or flagmen) in any crew used in any class of road service, including all miscellaneous and unclassified services, or

(ii) a stipulated number of brakemen or helpers in any crew used in any class of yard, transfer or belt line service, including all miscellaneous services to which mileage rates do not apply.

B. Establish a rule to provide that

1. Management shall have the unrestricted right, under any and all circumstances, to determine when and if trainmen (assistant conductors, ticket collectors, baggagemen, brakemen and flagmen) shall be used in each crew employed in all classes of road service, including all miscellaneous and unclassified services, and if used the number and classification of employes who will be so used; and when and if brakemen or helpers shall be used in each crew employed (including yardmen who work independent of a yard crew) in all classes of yard, transfer and belt line service, including all miscellaneous services to which mileage rates do not apply, and if used, the number and classification of employes who will be so used.

2. All agreements, rules, regulations, interpretations and practices, however established, which conflict with the provisions of this rule shall be eliminated.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

AFFIDAVIT OF LARRY S. PROVO ON BEHALF OF THE PLAINTIFF, CHICAGO AND NORTH WESTERN RAILWAY COMPANY

* * * * *

1. I am President and Chief Executive Officer of the Chicago and North Western Railway Company (hereinafter referred to as the "C&NW" or the "carrier"), * * *

* * * * *

6. * * * Any strike or work stoppage forcing the railroad to terminate its operations will endanger this investment of $1,276,632,000 and deprive the C&NW of $750,000 in revenue for each day it continues. Considering only the

loss of traffic during the strike to competing forms of transportation understates the injury to the corporate investment, as the experience of this industry has been that customers lost to competitors during strikes are often not regained on the resumption of normal services.

7. The C&NW is in such critical financial condition that restoration of unneeded jobs will have a serious impact upon the ability of the railroad to continue to provide the public with effective transportation service over its extensive 11,500 mile system. Our marginal economic nature is a matter of public record. The C&NW has had ordinary income deficits in five out of the last ten years. During the period 1963-1966, when wages and price levels remained reasonably stable, the C&NW enjoyed a modest net income from operations. Beginning in 1967, however, we began suffering deficits, a trend which has accelerated in 1969– in the first six months that deficit exceeds $11.2 million, creating a working capital deficiency at the end of the first half of 1969 exceeding $12 million.

* * * * *

9. * * * Upon the rendition of the Award of Arbitration Board No. 282 this management examined the work of our crews to determine where the manning of trains could be reduced consistent with an efficient operation. At that time, our trains were generally manned with a minimum consist of one conductor and two brakemen (*i.e.*, "1 and 2"). The C&NW then utilized the procedures of Section III(A) of the Award to effect those reductions. * * * As a result of agreements and awards so obtained, the C&NW was authorized to eliminate, as soon as attrition permitted, unneeded brakemen on approximately 200 crews.

10. The C&NW presently operates approximately 760 crews a day on the whole railroad, of which 429 are in yard service and 331 are in road service. Of the 331 crews in road service, 186 work on main lines (where the provisions of Award No. 282 did not apply) and 145 work on branch lines. Presently, pursuant to the authority of

the above-mentioned agreements and awards, the C&NW operates 128 crews in yard service (out of a total of 429) with a consist of either one conductor and one brakeman (*i.e.*, "1 and 1") or only one conductor, and 51 crews in road service on branch lines (out of a total of 145) with a consist of "1 and 1." Reductions on these 179 crews today represent an annual savings of $1,548,639 to the C&NW, a figure which increases annually as further attrition permits realization of the full benefits of our awards and agreements. Considering the critical financial condition of the C&NW, elimination of this annual savings of $1,548,639 would aggravate our present working capital deficiency and make even more impossible the modernization of our property, which is the only hope for the future if this railroad is to furnish the shipping public with needed transportation services.

11. Almost eighty percent of this railroad's 11,500 mile system consists of branch lines, many of which were constructed in the 19th Century to serve markets which have since shifted. Since these branch lines are marginal economic operations producing only a minimum amount of traffic today, they must be abandoned when rising expenses create deficits so great that their continuance can no longer be justified. The addition of unproductive employees to the 51 branch line crews presently working with a consist of "1 and 1" will only weaken the viability of those branch lines and accelerate their abandonment, to the detriment of the remaining shippers dependent on that service.

[Subscription and Notarial Certificate omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

TEMPORARY RESTRAINING ORDER

This matter came to be heard upon the plaintiff's motion for a temporary restraining order, supported by the verified complaint herein, an affidavit of James E. Wolfe, an affidavit of James R. Wolfe, and an affidavit of Larry S. Provo, from which it appears that the defendant, United Transportation Union has threatened a strike against the plaintiff, and that this strike and picketing will cause immediate and irreparable injury, loss, and damage before a hearing can be had on the plaintiff's motion for preliminary injunction, in that the plaintiff will be forced to suspend the transportation of passengers and freight in interstate commerce, with the consequences that if the strike is not restrained the plaintiff will be deprived of hundreds of thousands of dollars in revenues for each day the strike continues, many of its employees will be deprived of their employment and wages for the duration of the strike, many businesses will be deprived of essential transportation services, and railroad transportation in a large area of the United States may be seriously impaired, so as to impede seriously or interrupt altogether the transportation in interstate commerce of passengers, mail, freight, and express lading (including government mail and express, military personnel, and material), and food and other lading essential to the public health and safety.

IT IS THEREFORE ORDERED that the United Transportation Union, each of its divisions, lodges, officers, agents, servants, counsellors, and members, and all persons acting by, through, and for it, be and they are hereby temporarily restrained from authorizing or engaging in any strike against or picketing of the plaintiff over any dispute as to the proper consist of road and yard crews;

That this temporary restraining order be granted on the condition that an undertaking in the sum of *$5,000.00* be filed to make good such damages not to exceed said sum as may be suffered or sustained by any party who is found to be wrongfully restrained;

That the defendant be and is hereby directed to show cause, before this Court at *2:00 P.*M. on *November 28,* 1969, why the plaintiff's motion for preliminary injunction should not be granted;

That this temporary restraining order shall expire at *8* o'clock *P.*M. on *November 30,* 1969, unless it is further extended by order of this Court; and

That this temporary restraining order may be served by any person over the age of eighteen years, selected for that purpose by the plaintiff.

Dated: 8 o'clock P.M.
November 19, 1969

J. Sam Perry
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption Omitted in Printing]

MOTION TO VACATE
TEMPORARY RESTRAINING ORDER

Now comes the defendant, UNITED TRANSPORTATION UNION, a voluntary unincorporated association, by JOHN J. NAUGHTON, its attorney, and moves This Honorable Court to vacate the Temporary Restraining Order entered herein without notice to defendant on November 19, 1969, on the grounds that:

1) The Complaint fails to state a claim upon which relief can be granted;

2) The plaintiff's attorney failed to certify to the court his efforts, if any, to give notice to the defendant or its attorney and the reasons why notice should not be required, and

3) The issuance of a Temporary Restraining Order is not necessary for the prevention of irreparable injury to the plaintiff as more fully appears from the Affidavit of Francis D. Tuffley attached hereto.

[Subscription omitted in printing]

AFFIDAVIT

FRANCIS D. TUFFLEY, being first duly sworn, on oath deposes and says:

1) That he is a Vice President of the UNITED TRANSPORTATION UNION, the defendant in this cause, and is assigned to the dispute between the said Union and the Chicago and North Western Railway Company which is set out in the Complaint;

2) That as part of such assignment, he participated in a preliminary conference on the property on August 6, 1968 which is referred to in paragraph 17 of the Affidavit of James R. Wolfe. Though this was a mere preliminary conference, he came to the opinion, at that time, that the demands of the railroad were so different than demands on other railroads that he did not feel they could be justified. He not appeared in the conferences after the mediation had expired and arbitration had been declined. As part of his preparation for this appearance, he reviewed the conferences at which he had not been present. He then got in touch with Mr. James R. Wolfe, by telephone, and requested that conferences be resumed. After several phone calls, it was agreed to resume conferences on November 12, 1969. In the course of those conferences, we discussed each crew individually and our respective positions. Neither party

insisted that all crews had the same consist. The disagreement was over specific crews. In the course of that conference, we agreed to withdraw all of our requests for a crew consist of 1 and 3;

3) The carrier's counter-proposal Section 6 Notice was discussed in those conferences in that the subject matter was consistently discussed;

4) At no time did we make an adamant demand that an agreement on the C&NW had to be identical with agreements on other railroads and, in fact, this would have been impossible since those agreements differed;

5) At no time did we demand that any agreement could not be less favorable than the most favorable crew consist agreement reached on any other railroad;

6) In the course of the negotiations, the Union had refused to agree to engage in National handling of this dispute, but subsequently National handling became impossible because most of the other railroads entered into crew consist agreements. In the post-mediation conferences, no request for or mention of National handling was made;

* * * * *

[Subscription and notarial certification omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

AMENDMENT TO VERIFIED COMPLAINT

Now comes the plaintiff, Chicago and North Western Railway Company, a corporation, by its attorneys, James P. Daley, Robert Schmiege, William H. Dempsey, Jr. and David Booth Beers, and pursuant to Rule 15(a) of the Federal Rules of Civil Procedure hereby amends the Verified

Complaint filed on November 20, 1969 in the following respects:

1. Paragraph 5 of the Verified Complaint is amended to read as follows:

> "5. The BRT notices and carrier counter-notices referred to in Paragraph 4 above were discussed by the parties in conferences held on the property of the carrier, but no agreements were reached. The dispute was also the subject of mediation under the auspices of the National Mediation Board. However, mediation failed to produce any agreements, and the Mediation Board urged the parties to submit the dispute to arbitration. The C&NW accepted, but when the BRT declined, on October 16, 1969, the Board terminated its services."

2. Paragraph 8 of the Verified Complaint is amended to read as follows:

> "8. The plaintiff disagrees with the position of the UTU set forth in Paragraph 7 above. The plaintiff takes the position that it has complied with the requirements of Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First) 'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions' in the present dispute. The plaintiff takes the further position that the UTU has not complied with the foregoing requirements of Section 2 First of that Act in that:
>
> First: Having insisted in the foregoing dispute upon bargaining separately with the plaintiff carrier instead of bargaining jointly with all the railroads upon which the BRT had served like notices, nevertheless
>
> (a) The defendant has refused to bargain on the proposals in the carrier's counter-notices to reduce the size of main line crews;
>
> (b) The defendant has insisted that any agreement on the C&NW must conform to the results of the agreements reached on the other railroads upon

which the BRT served like notices without any consideration given to conditions existing on the C&NW;

(c) The defendant has entered negotiations with a fixed position and a determination not to deviate from the position regardless of what relevant consideration might be advanced by the C&NW; and

Second: Notwithstanding the foregoing, the defendant has refused to engage in national handling of this dispute and to negotiate on a joint basis a national crew consist agreement with all the railroad on which the BRT served like notices.

[Subscription and certificate of service omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

VERIFIED ANSWER TO VERIFIED COMPLAINT

Now comes the UNITED TRANSPORTATION UNION, a voluntary, unincorporated railroad labor association, organized under and existing by reason of the provisions of the Railway Labor Act, by John J. Naughton and John H. Haley, Jr., its attorneys, and for its Answer to the Verified Complaint says:

FIRST DEFENSE

The Verified Complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

This Court lacks jurisdiction, pursuant to the Norris-LaGuardia Act, 29 USC 101 (et seq.) to grant the relief prayed for in the Verified Complaint.

THIRD DEFENSE

This defendant states that the plaintiff, throughout the handling of this dispute, has been guilty of bargaining in bad faith and has failed to exert every reasonable effort to settle the instant dispute and further avers that this plaintiff-railroad, along with many other United States railroads, has been held to have been guilty of bargaining in bad faith by the Opinion and Judgment of the United States Court of Appeals, for the District of Columbia in *BRT v. Akron & Barberton Belt R. Co.*, 385 F.2d 581, 597, 598 (1967). Certiorari denied, 390 US 923. Defendant further avers that plaintiff-railroad has consistently attempted to develop a case to prosecute in the courts rather than make an effort to arrive at an agreement as to the crew consist rule.

FOURTH DEFENSE

1) Defendant admits this is an action for an injunction but denies all other allegations contained in paragraph 1;

2) Defendant admits the allegations contained in paragraphs 2 and 3 of the Complaint;

3) Defendant admits the allegations contained in paragraph 4.

4) Answering paragraph 5, defendant admits that the BRT Notices and the carrier counter-notices were discussed by the parties in informal conferences held on the property of the carrier but avers that the carrier took the position that those Notices were premature when they were served in 1965 and continued to hold that position until January of 1968 when this dispute over "prematurity" was finally resolved in the defendant-union's favor by the denial of a Petition for a Writ of Certiorari by the United States Supreme Court. Defendant also admits that this dispute was mediated under the auspices of the National Mediation Board and that there were no agreements as the result of this mediation. Defendant avers that plaintiff never intended to reach an agreement but that, instead, it sought

to exhaust the mediation process so that it could bring a law suit seeking to permanently enjoin any self-help by the union over the dispute set out in Section 6 Notices. Defendant admits the Mediation Board terminated its services and that the C&NW accepted the arbitration and that the BRT declined. Defendant further admits that on October 16, 1967 the Board terminated its services;

5) Answering paragraph 6, defendant admits that the BRT was succeeded as an entity by this defendant and further admits that the individual negotiators for the two organizations have been, for the most part, the same throughout but denies that the positions now taken in this dispute by the UTU are the same as those formerly taken by the BRT;

6) Defendant admits the allegations contained in paragraph 7;

7) Answering paragraph 8, defendant admits that the plaintiff-railroad is taking a position. Defendant avers that that "position" is without any merit and that it is taken for the purpose of delaying the eventual signing of a crew consist rule. Defendant states that plaintiff is barred from taking the position that it exerted every reasonable effort to make and maintain agreements in the face of the holding by the Court of Appeals, for the District of Columbia, that it did not take such action. Further answering paragraph 8, defendant asserts that it has bargained on the carrier's counter-notices; that it has given consideration to conditions existing on the C&NW; and that it has not entered negotiations with a fixed position and with the determination not to deviate from that position. Defendant admits that it had refused to engage in National handling of this dispute at an earlier time and avers that this refusal was held to be proper by the United States Court of Appeals for the District of Columbia in *BRT v. Atlantic Coast Line*, 383 F.2d 225 (1967); that there is no distinction that can be drawn between the position of the 3 railroads immediately involved in that dispute and the position of the

plaintiff here and that, in fact, the railroad has not requested any National handling of this dispute in conferences between the parties, either during those conferences held in mediation and those conferences held after the mediation of this dispute. Defendant denies each and every other allegation contained in paragraph 8;

8) Defendant denies that it has threatened to strike the plaintiff. Defendant avers that any strike or exercise of self-help, which might be called, would not be in violation of the Railway Labor Act;

9) Answering paragraph 10, defendant admits that any strike called by it, if successful, would in varying degrees bring the operation of the C&NW to a halt. Defendant avers that no commuter service of the plaintiff would be disrupted since it is the policy of this organization to maintain commuter services on railroads in the Chicago area in every strike situation. If those commuter services are not maintained, it will be solely because the railroad itself has decided not to maintain them. Defendant admits that the plaintiff will lose revenues in an indeterminate amount if a strike is called and is successful. Defendant denies all other allegations in paragraph 10;

WHEREFORE, defendant denies that plaintiff is entitled to the relief or any part thereof requested in the prayer of its Verified Complaint and asks that the Verified Complaint be dismissed at the plaintiff's costs and that the defendant be allowed all the costs incurred herein through the issuance of the Temporary Restraining Order and for those costs which occur or may occur after the issuance of the said Temporary Restraining Order, and specifically requests that the costs assessed against the plaintiff include a reasonable attorney's fee.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

[1] **TRANSCRIPT OF PROCEEDINGS**

had in the above-entitled cause before the Honorable J. SAM PERRY, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, commencing on Tuesday, December 2, 1969, at the hour of 2:00 o'clock, p.m.

* * * * *

[16] JAMES E. WOLFE

called as a witness by the plaintiff herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCHMIEGE:

* * * * *

[17] Q. As an introduction, Mr. Wolfe, would you tell us what your experience has been in the railroad industry? A. Yes. I entered the service of the Chicago Burlington & Quincy Railroad Company at Hannibal, Missouri on February 2, 1918. * * *

* * * * *

[18] A. I was assistant to the executive vice-president, assistant vice-president, and finally vice-president in charge of personnel and labor relations matters for the Burlington System, that is, the Chicago, Burlington & Quincy, the Fort Worth and Denver, and the Colorado Southern. During that period a great part of it I was a member of the Carriers' Conference Committee representing the Western Railroads. I finally became permanent chairman of the Western Carriers'

Conference Committee [19] and the Committee on Labor Relations for the Western Railroads.

Then the National Railway Labor Conference was created to handle labor matters at the national level for practically all of the railroads in the industry. When that organization was created, I was selected to be its chairman. * * * I represented the railroads when this dispute and many disputes that were in existence at the time before Emergency Board No. 154. * * * The dispute, as Mr. Haley stated to the Court, involving the L&N, the Illinois Central, and the Belt, I did [20] some work for those railroads.

Q. This was after your retirement? A. Yes, that was after my retirement.

Q. Mr. Wolfe, could you explain to the Court, please, what a Carriers' Conference Committee is? You referred to the fact that you were a member of the Western Carriers' Conference Committee. A. A Carriers' Conference Committee is a limited number of officers from the railroads who were selected to represent the railroads within a region and the handling of disputes on a national basis. In this industry we have the Western Region, the Eastern Region, and the Southeastern Region. Disputes of that character have been handled on a national basis, about which I will testify later, for many, many years.

Q. You also referred in your testimony to the fact that you were once Chairman of the National Railway Labor Conference. Could you explain to the Court, please, what that conference is? A. Yes. The presidents of the railroads had discussed for considerable time possibility of organizing an organization which would be in charge, that is, they would have the authority to handle labor matters at the national level for all of the [21] railroads in the industry. Now I say all of the railroads. There were some small railroads that were not members of the National Railway Labor Conference, but almost without exception those railroads had stand-by agreements. When a national agreement was executed those railroads accepted the terms of such an agreement.

Q. Would you define for the Court the term "national movement" as it is used in the railroad industry? A. Yes. It has been described on several occasions by the National Mediation Board and others, but in substance, a national movement represents a dispute or the serving of identical notices by a union or a group of unions upon almost all of the railroads of the industry, or it could be that the railroads of the industry would serve almost identical notices at about the same time on a particular union or a group of unions. Where the issue or issues involved are identical and involve a great number of railroads, that, as we understand it, is a national dispute, whether it was originated by the serving of notices by union or unions, or by the railroads.

[22] Q. What has been the customary method in the railroad industry for handling these national movements that you have just described? A. Well, almost without exception, the so-called national disputes, as I stated earlier, arise out of the serving of a great number of notices. With a few exceptions, they have been handled on a national basis. The railroads give their power of attorney to the National Railway Labor Conference, or prior to the creation of that conference, to the Regional Conference committees, and the dispute or disputes are handled to a conclusion. It has worked very satisfactorily.

* * * * *

[24] MR. HALEY: May it please the Court, I dislike to interrupt Mr. Wolfe, but I think I must object to this entire line of questioning.

[25] We—Mr. Wolfe, Mr. Dempsey, Mr. Beers and I—participated in the trial of the *Atlantic Coastline v. the Brotherhood of Railroad Trainmen* in which this same testimony that is being given here now by Mr. Wolfe was given by him there. I have a transcript in my room which I have sent for of the testimony about national handling in the past as given by Mr. Wolfe and others.

The question of a duty of a union to negotiate on a national basis based on Mr. Wolfe's testimony, which was

identically before what it is starting out to be now, has been resolved. It has been resolved by the Court of Appeals for the District of Columbia; certiorari has been denied by the Supreme Court of the United States. The Courts have held that this union has not violated and does not violate any duty that it has under the Railway Labor Act by refusing to engage in national handling with respect to the crew consist dispute.

I see no reason to retry that issue before this Court. I recognize that the North Western Railroad says that it was not a party [26] to the Atlantic Coastline decision as a formal party, but it has served the identical notices that the Boston & Maine, Atlantic Coastline and Des Moines union had served. It had made the identical demand for national handling. It has gotten the identical response from the union of refusing it. The courts upheld the union. I see no point in relitigating the Atlantic Coastline case here.

If it will help the Court, as soon as it will get here, I will furnish the Court with a transcript of the testimony Mr. Wolfe is now giving that he gave in the Atlantic Coastline case. It will save us sitting here listening to this again. * * *

THE COURT: I will accept your offer to present it to me, and I will take it home with me and read it tonight and we can go on to some other subject.

* * * * *

[27] MR. SCHMIEGE: I don't understand counsel's objection.

THE COURT: I will read it all, though.

MR. SCHMIEGE: The objection that has been sustained is that we avoid material that was discussed in the Atlantic Coastline case.

THE COURT: That is right, on his representation that he will present me the transcript.

MR. HALEY: I have the joint appendix as well. I believe it includes it all. It was agreed that that was sufficient.

THE COURT: All right. * * *

MR. SCHMIEGE: Well, at this point, then, your Honor, could I introduce certain exhibits that were also exhibits in the Atlantic Coastline case.

* * * * *

[29] MR. DEMPSEY: I should like to make a few comments about the relevance of the Coastline litigation and the Nashville litigation because Mr. Haley has raised the matter.

Now, this case is different than either of those. I think we ought to underscore that right at the outset. * * * [30] Now, I put to one side a principal issue, and that is the good faith bargaining question as it relates to assuming a predetermined position and not deviating and being unwilling to engage in negotiate in meaningful negotiations. Another witness will speak of that more prominetly than Mr. Wolfe. And that is sort of, more or less, a garden variety kind of good faith bargaining issue that turns on the facts of the case.

The other aspect, however, of the good faith bargaining argument in this case does relate in a very important way to the kinds of issues that were litigated in the Coastline case in the District of Columbia. This brings into play the question of national as against local handling of railway labor disputes.

Now, Mr. Haley suggests that what we are doing here is relitigating Coastline. That in a sense is true. But in a much more important sense, it is not true. We are not simply here asking this Court to come to a conclusion [31] different with respect to the C&NW than the District of Columbia Court of Appeals came to with respect to the several roads involved in that litigation.

What we are saying has, rather, two aspects to it in connection with the Coastline litigation.

In the Coastline case, the Court decided, as your Honor is aware, that in the crew consist controversy, the union was free to engage in local handling because in the Court's judgment based on the evidence of record in that case, local handling—that is, handling with a view toward local consid-

ıtions as opposed to national uniformity—would be the ost promising method of resolving this dispute peacefully. Now, we say in the first place as to that that our evidence ll show in substance that the union has not followed the ndate of the Coastline decision; that it, indeed, has not rgained on a local basis with a view toward local consid- ıtions, but rather has been governed by considerations of mpelling national uniformity.

[32] But beyond that we say this: In substance, what r argument is with respect to Coastline is that had the strict of Columbia court had the benefit of the unfold- of the facts of negotiations that occurred in the wake the Coastline decision on the principles that it applied arriving at its result, its result would have been the oppo- e.

That is to say, if instead of Mr. Luna testifying in Coast- e as he did, that this was a matter as to which National iformity was not necessary, but rather had he testified t the union would be looking in negotiations toward uring substantial national uniformity, then it seems to quite evident that one simply has to read the Coastline ision and see that the result there would have been dif- ent.

So, in the sense that we are relitigating Coastline, we are ng it on the basis of considerable subsequent actual bar- ning experience. We suggest that that is highly relevant this case.

[33] Now, of course, we are entirely agreeable to short- ting the introduction of testimony, so, therefore, we cer- nly will follow your Honor's suggestion that so far as the tory behind the 1959 services of notices is concerned, that Wolfe gave in the Coast Line litigation, we are prepared rely upon the transcript of the Coast Line case as well upon Mr. Wolfe's affidavit which is on file here. But t is not by any means to suggest that that background not relevant to the arguments that we advance to this urt.

* * * * *

Now so far as the Nashville litigation is concerned I would just like to make one observation: As Mr. Haley has said, that case was tried for about a week. The restraint there [34] against the strike was extended several times. It finally amounted to about a month's restraining order. The case was never actually decided because of an interim settlement between the parties.

* * * * *

In connection with the litigation, however, in describing the litigation, Mr. Haley advanced to your Honor as a reason for dismissing the complaint the argument which I think it fair to say he pressed most vigorously in Nashville, and that is the argument basically that an injunction will not lie to enforce Section 2 First after exhaustion of the formal procedures of the Act, that is, after mediation has been completed and after an emergency board has settled–

THE COURT: That is really the question here, isn't it?

MR. DEMPSEY: Yes, it is, but the important [35] intervening fact, that is intervening between Nashville and this trial is that that issue has been decided against Mr. Haley's position by the Fourth Circuit Court of Appeals in the Piedmont case decided last September. The case is cited in our brief. I believe your Honor has been supplied with copies of it. I did not want to let the occasion pass without drawing your Honor's attention to that with respect to that central legal issue. Thank you.

[36] THE COURT: You may proceed with the further examination of this witness.

* * * * *

[40] MR. SCHMIEGE: Before we broke off, your Honor–

MR. HALEY: Excuse me before you get going.

May the record show that I now hand to the Court, which I have shown to Mr. Dempsey, a copy of the Joint Appendix in Brotherhood of Railroad Trainmen v. Atlantic Coastline Railroad Company, No. 20718 United States Court of Appeals for the District of Columbia.

THE COURT: Pass it to me. I will have it stamped and marked.

* * * * *

42] THE COURT: It is being made a part of the rec-
o here.

* * * * *

[46] BY MR. SCHMIEGE:

). Mr. Wolfe, will you explain to the Court or define fo the Court the term "crew consist"? A. Yes. In the ra road industry when we refer to "crew consist" we have in mind the number of employees in a road train crew or a ard train crew. Now when we say "1 and 2" we mean a nductor and two brakemen. If it is in yard service the co ductor is some times referred to as the foreman and the br kemen are sometimes referred to as helpers. When we sa "a crew of 1 and 1," we reduce the number of brake- m or yard helpers from 2 to 1, otherwise my definition of and 2 is exactly the same for 1 and 1.

* * * * *

BY MR. SCHMIEGE:

49] Q. Mr. Wolfe, was the matter of crew consist in lved in any national movements prior to 1959? A. Yes, cr consist was involved in the [50] national movements in 19 7, 1949 and 1953.

* * * * *

. Did any of those disputes proceed to Emergency Bo ds? A. Yes, they did, but the time limitations of the Ra way Labor Act are such that it just wasn't possible for the Emergency Board within the time [51] limits of the law to investigate those matters. There were also, of course, in ose cases rules, notices which were served by the unions. Th were all treated the same.

* * * * *

8] Q. Will you discuss the bargaining that took place aft the commission made its report?

* * * * *

8] Q. Would you tell the Court, please, Mr. Wolfe, wh action the union took under the Railway Labor Act pri to the expiration of the award? A. Well, the union ser d notice in July 1965 of a desire to negotiate agree- me s which would require the employment of a conductor an two brakemen in all classes of road and yard service.

Q. When did the award expire? A. The award expired on January 25, 1966.

Q. So that notices were served during the term of the award? A. Yes, they were.

Q. Would you explain what those notices proposed on crew consist? A. A uniform crew consist of one conductor and two brakemen.

Q. How did this 1965 notice compare with the crew consist portion of the union's 1960 notice? A. Identical.

* * * * *

[89] Q. How were those 1960 notices handled? A. On a national basis before the Presidential Commission, Emergency Board 154 and Arbitration Board 282.

Q. How many railroads received this 1965 notice on crew consist? A. Well, there were about 80 major railroads.

The railroads in the east that entered into the so-called Luna agreement did not receive such notices.

Q. Did these notices vary at all in content from railroad to railroad? A. No. They were substantially identical. They all would have required a crew of 1 and 2.

Q. What position did the railroads that received those notices take on their legality? A. Well, we took the position—and I had not then retired—that the notices were premature, that they were being served during the life of [90] Arbitration Award 282, and we had no duty to bargain under those circumstances.

Q. What action did the railroads take under the Railway Labor Act when it received those notices? A. Well, we were certain that the question as to the life of the award would inevitably become a subject of litigation. So, in order to protect ourselves, we served a counter-proposal.

Now, if we were successful in our endeavor to prove to the Court that the B.of R.T. notices were premature, well, then we conceded that ours were, likewise, premature.

Q. Well, at what time were our notices served? A. In December of 1965.

Q. So, they were served during the term of the award, too? A. Yes, they were.

* * * * *

[92] MR. DEMPSEY: After the adjournment yesterday we went back to the drawing boards and made a determined effort to streamline our presentation of oral testimony so that we could, if possible, cut back on the trial time. We are going to do that with the remainder of our testimony. There are certain risks of breaks of continuity in our presentation associated with that, but I think if I could just sketch very briefly where we are and where we propose to go, that framework will become apparent and the parts of our affidavits that we won't be putting on by way of oral testimony will be in focus. Of course, the witnesses are available for cross examination on anything in our affidavits.

[93] Now your Honor will recall that Mr. Wolfe yesterday spent a good deal of time sketching in the historical background of the crew consist dispute, which for all practical purposes—

MR. DEMPSEY: We can mark the beginning of that history of the service in 1959 the notices that led to the litigation before your Honor in the Baltimore and Ohio case in which your Honor's judgment was affirmed by the Supreme Court. Now those historical materials are relevant to our national handling argument, but they are not as directly relevant as the events which have occurred that we are about to come to and to some extent we have gotten into already with respect not to these 1959 notices and that litigation, but rather to the notices that were served in 1965 and to the period of time after the services of those notices because that, after all, the question here bears upon what happened in this more recent segment of time and not what happened before the bringing of the Baltimore and Ohio case.

So now that Mr. Wolfe has traced the [94] history of the older dispute which is a discrete dispute and a separate one, through the Arbitration Award, Arbitration Board No. 282, we now move into the period that is directly related to this case. In detailing what has happened in this recent period with respect to the notices that gave rise to this dis-

pute, Mr. Wolfe will be concentrating upon bringing to the Court's attention the kind of representations that were made by the Union in the Atlantic Coastline litigation with respect to the kind of bargaining that should be engaged in, that is, local bargaining, not the view toward national uniformity. And then in the last part of his testimony he will be talking about his experience with respect to how the union actually did negotiate once it had the Coastline judgment in hand.

[95] There are parts that will be omitted in this history, but they are set forth in the affidavit. Now then, when we follow with our next witness, which will be Mr. James R. Wolfe, the vice-president of the Chicago North Western Railroad, then we will be talking about the actual negotiations on the Chicago & North Western during this recent period associated with these recent notices, and there, of course, we are in the area of the evidence that is the most directly related to the issue before the Court.

Now, in Mr. Wolfe's testimony, Mr. James R. Wolfe's testimony, we will be compressing very sharply a good deal of the material in the affidavits that goes to the actions that related to the Chicago & North Western in these prior periods. We are just going to rely on our affidavit for that and upon the first Mr. Wolfe's testimony. Because insofar as that previous history is concerned the position of the Chicago & North Western was for all practical purposes the same as the position of all other railroads in the country. As I say, in omitting some pieces of oral testimony we do not mean to depreciate their importance, we simply do that in [96] an effort to expedite the matter and get the most directly relevant oral testimony out before your Honor and not have the case prolonged unduly. I think that if your Honor has no questions about that, we will proceed, then, with Mr. Wolfe's testimony.

MR. HALEY: If the Court please, I don't want to assume or try to tell the plaintiff how to try their lawsuit except to say this; that I continue to urge upon the Court that the Court of Appeals for the District of Columbia Circuit and

the Supreme Court obviously did not decide the Atlantic Coast Line case on the basis of anybody's testimony. They were construing the Railway Labor Act, the requirements of it. I can hardly believe that it is relevant at all—or certainly, it seems like an erroneous concept that the decision in the Coast Line case was induced by Mr. Luna's testimony or by Mr. Wolfe's testimony. I took it that from the decision of the Court it was the Court's own conception of the requirements of the Railway Labor Act, something that hasn't changed or been changed since 1934. So, if they want to put it in, and the Court wants to hear it, I am perfectly [97] willing to sit here. But I just urge it has no relevance.

THE COURT: I do not know how relevant it is, that is the thing I was thinking of is how relevant it is what happened on those railroads. What I am coming to is what has happened here.

MR. HALEY: Of course, what happened on those railroads was, as Mr. Dempsey said, precisely the same thing happened on the North Western as happened on the Coast Line.

* * * * *

[98] MR. HALEY: We contend that is not relevant because mediations terminated and the processes of the Act have been exhausted. Of course, I am away from home and I would like to go home, but I am just as happy to stay right here. I enjoy the courtroom. I think we have got a question of law here more than a question of fact.

MR. DEMPSEY: Your Honor, the relevance of the testimony, in the first place, I don't think it is inappropriate to suggest that the Court in many cases bases its decision on the evidence of record, that is what we are suggesting here. But the relevance, the immediate relevance—

THE COURT: Yes, what is the relevance of what happened?

MR. DEMPSEY: Let me address myself to that, your Honor.

What the evidence will show is that in the Coast line litigation, the Union witnesses testified that the only appropriate way to bargain on the crew [99] consist matter is by way of negotiations based on local conditions, that is, what the curves are, what the curvatures of the tracks are, all of those things that are associated with the local circumstances on the railroad. And that a pattern of national uniformity with respect to crew consist rules was not a practical way to deal with the problem. Now then—

THE COURT: What you think is you want to offer that to show national pattern and then show what took place here; is that what you are seeking to show?

MR. DEMPSEY: What we want to show is that is what the Union representative said then, then on the Chicago North Western. We are not going to talk about negotiations on other railroads to any significant extent. We are going to concentrate on negotiations on the Chicago and North Western.

What we propose to show is that when the Unions secured that judgment and was in the position to engage in the whipsaw strike tactics, which it did engage in in order to topple the defenses of the railroads one by one, when it had that judgment it turned around and in negotiations on the Chicago [100] North Western when the Chicago North Western representative said all right, now we think there should be national handling of this dispute, but if you are going to negotiate on our property alone, then you must negotiate in terms which you said these negotiations ought to take place, that is by giving consideration to the situation on the Chicago North Western. But rather than do that we propose to show what the union did was to take from the outset and without any deviation, the firm position that no solution would be acceptable on the Chicago North Western except one that accorded with the national pattern of agreements that have been extracted from the rest of the railroads in the industry. Now that is what we propose to show.

THE COURT: Well, let us proceed even though it may be irrelevant. Let us go ahead and get it in.

* * * * *

[101] JAMES E. WOLFE

DIRECT EXAMINATION (Resumed)

LY MR. SCHMIEGE:

Q. Mr. Wolfe, when we finished yesterday you had just testified that in December of 1965 the railroads served counter-notices, and you explained why those notices were served.

Would you now tell the Court, please, what those notices proposed regarding crew consist? A. Those notices proposed that the carriers would have the right to determine the number of employees who would be employed in road train and yard crews.

[102] Q. What did those notices propose regarding the national handling of that dispute? A. The railroads proposed that if there was no disposition of the issues arising out of the notices, that the dispute be handled on a national basis.

Q. How did these 1965 notices compare with the crew consist portion of the notice that the carriers had served back in 1959? A. They were identical except the 1965 notices had nothing to do with self-propelled machines.

Q. How many railroads served this 1965 notice on the Brotherhood of Railroad Trainmen? A. 80 railroads served notices on the union.

Q. Did this notice vary at all in content from railroad to railroad? A. They were identical notices.

Q. What reply did the union make to that part of the notice that requested national handling? A. They refused to so handle it.

Q. Were there any conferences held on individual railroads over these notices? A. Yes, there were initial conferences as required by law.

* * * * *

[114] Q. Mr. Wolfe, after the Jacksonville agreement was made, did any other railroads settle the crew consist

dispute? A. Yes, there were several railroads that disposed of the dispute.

Q. Were there any more strikes over the crew consist dispute? A. The Chicago Belt Line was struck in July 1968. That strike lasted 101 days, and the L&N was struck in November of 1968.

Q. After these strikes occurred, what action did the President take under the Railway Labor Act? A. The President exercised the discretion vested in him under Section 10 of the Railway Labor Act, and appointed Emergency Board No. 172, and that Board was to hear and make recommendations on the dispute involving the L&N, the Belt Railroad, and the Illinois Central which was threatened with a strike.

* * * * *

[115] Q. What sort of proceedings did the emergency board conduct? A. They had evidentiary hearings and then mediation.

* * * * *

[117] Q. Did negotiations resume after the Board made its report? A. I understand they did.

Q. Did you participate in those negotiations? A. Yes, I met with Mr. Luna on December 23, 1968.

Q. And in what capacity were you when you met with him? A. Well, I was sort of an unattached representative of the three railroads.

[118] Q. You had been engaged by those railroads to represent them in those negotiations? A. Yes. They knew that Mr. Luna and I had been good friends for years, and they thought I might be helpful in reaching an understanding which would dispose of those issues.

Q. Would you tell us what position Mr. Luna took in those negotiations? A. Well, we were not able to make any headway, and I asked Mr. Luna if I was at liberty to inform representatives of the railroads as to his attitude in regard to the disputes that were before us, and he said he had no objection whatever to me so informing those people. Mr. Luna told me that a settlement on those railroads could not be reached unless they agreed to settlements, to

agreements substantially similar to the agreements made with the railroads at Jacksonville, which we refer to as the Jacksonville agreement.

I asked if he thought that was good faith bargaining, especially in the light of his prior position in the ACL case, that the dispute should be handled locally but that there should be studies and the final determination as to the number of men in [119] any crew should be based upon the conditions applicable to that particular crew.

Mr. Luna also flatly refused to discuss our counter-proposal dealing with through freight service.

[120] Q. Would you tell the Court now what happened to those three railroads that you had been engaged to represent? A. Well, L & N was struck on January 13, 1969. A temporary restraining order was issued. During the litigation a settlement was reached which disposed of the dispute. It was for all practical purposes identical with the Jacksonville settlement. There was immediate restoration of 50 per cent. On or about May 26, '69, a final agreement was reached restoring virtually all of the trainmen who were eliminated pursuant to Award 282.

Q. What happened to the Chicago Belt? A. Well, on April 3, '69, an agreement was reached which had the effect of restoring practically all, if not all, of the yardmen who had positions which had been eliminated.

Q. The last railroad that you were representing was the Illinois Central. What happened to that? A. The Illinois Central was struck on April 8, '69.

Q. What was the result of that strike? A. On April 13 that railroad signed an agreement almost identical with the Jacksonville agreement. [121] There was some slight variations because the Illinois Central had commuter service which the other railroads did not.

Q. What position did the Union take in its negotiations with the Illinois Central? A. The same position they had taken with all of the others, 1 and 2 or nothing. In other words, for all practical purposes, a national agreement signed locally.

Q. Mr. Wolfe, would you now explain to the Court, please, the distinction as it exists in the railroad industry and the Railway Labor Practices between the term "national handling," and the term "uniform national rule"?

* * * * *

A. Well, national handling means that committees representing the railroads on the one [122] hand and the unions on the other negotiate agreements that have national application. Now, local handling may produce the same results. You may get rules that are similar, but the union may strike the individual railroads in order to compel each railroad to do what the first railroad did irrespective of what kind of an agreement the first railroad made. It may be completely intolerable, completely unjustified. But if the union insists that the other railroads adopt the same kind of an agreement, they threaten to strike, or they do strike as they have here, first the ACL and then the Missouri Pacific, then the Chicago Belt, then the L & N, then the Illinois Central, they strike them one by one and you wind up with for what is a national agreement obtained under duress because they can strike the railroads, and you find something entirely contrary to what the Court of Appeals said when it reversed Judge Holsoff. I refer to and I quote, "A national prescription of crew size would be wholly unrealistic." But you can take the railroads one by one, strike them, threaten strike, and you get a wholly unrealistic national rule.

[123] Q. Mr. Wolfe, in your experience in the industry, is it possible to have national handling without developing a uniform national rule? Have there been any examples that you can remember? A. Oh, yes. I know of many cases where proposals were served, but they were not negotiated into agreements. Now is that what you have in mind?

Q. Yes. A. Yes. There are many such proposals. Either the Emergency Board didn't have the time to conduct a thorough investigation or for other reasons, the unions would drop a proposal or the carriers would drop a proposal.

* * * * *

Q. Has there been any national handling that developed certain national procedures but not necessarily a national rule? A. Oh, yes. There are two that I have in [124] mind; one is a national rule dealing with the extension of switching limits. It was agreed nationally that if there was necessity for extending the area in which yard crews might be used to perform switching, you would negotiate, but if you failed to reach an agreement the national agreement provided that the dispute would be submitted to final and binding arbitration. Then on June 25, 1964, just a few months after the issuance of Award 282, an agreement was reached with the five operating brotherhoods, which disposed of all of the so-called secondary issues arising out of the carriers' notice of November 2, 1959 and the notice served by the unions on September 7, 1960. Article 5 of the National Agreement of June 25, 1964 dealt with the continuance of yard crew assignments where the work involved was less than four hours in an eight-hour shift. That national agreement likewise provided for arbitration if arbitration was necessary.

Q. In both of these– A. Not exactly arbitration–well, arbitration, yes, final and binding arbitration.

* * * * *

[126] CROSS EXAMINATION

BY MR. HALEY:

* * * * *

Q. You commenced–this crew consist dispute which we are dealing now, became a dispute between the unions representing train and yard service employees a little over ten years ago? A. The Section 6 notice was served on November 2, 1959; that is correct.

Q. So it has been what we might call a bone of contention, then, for more than ten years? A. Yes, I thought Arbitration Award 282 disposed of it.

Q. Regardless, it is still a bone of contention because we are still in this courtroom today contending [127] about it, aren't we? A. Well, you are cross-examining me. I suppose you have a reason for it.

Q. I mean, isn't that right? A. Oh, yes. there is a dispute.

* * * * *

Q. It is unresolved, the dispute is, between the unions and the railroad yet? A. Yes, that is correct.

Q. This same dispute, the Chicago North Western and the railroads it has since acquired by a merger or by a stock control are still in the same dispute with the same union? A. Yes, it seems like the union is going to carry it on forever.

Q. Or the railroad, depending on your viewpoint? A. Yes. My viewpoint is as I expressed it.

* * * * *

[128] Q. Now, then the PRC of which you were a member—well, do you remember who represented the Brotherhood of Railroad Trainmen in the PRC proceedings? A. Yes, I do very well.

Q. Doc Sikes was one, wasn't he? A. Well, Doc Sites was the only Brotherhood of Railroad Trainmen member, a gentleman whom I had the very highest regard.

Q. Who unfortunately recently passed away? A. That is what I learned.

Q. Of course, at that time the Brotherhood of Railroad Trainmen represented only part—although, the majority of brakemen and switchmen? A. They represented almost all road brakemen and about 84 per cent of the yardmen.

Q. The Order of Railway Conductors and Brakemen represented conductors and some brakemen? A. They represented brakemen on the Great Northern and maybe one or two little railroads, that was all.

[129] Q. The Switchmen's Union of North America represented between—between those three unions, the Brotherhood of Railroad Trainmen, the Order of Railway Conductors and Brakemen and the Switchmen's Union of North America represented practically all of the train and the yard crews? A. That is correct.

* * * * *

Q. So that all of the parties to the crew consist dispute were participants in the formation or in the obtaining the Presidential Railroad Commission's establishment or the establishment of the Presidential Railroad Commission and its proceedings, isn't that right? [130] A. Well, your question is a little bit difficult, but I will try to answer it.

It is true that the five operating brotherhoods participated in the negotiations which culminated in the creation of the Presidential Railroad Commission, and all of the operating brotherhoods had a representative on the Commission.

Q. And, of course, I don't take it that you would represent to the Court in your testimony here that there were no discussions at all between the representatives of the carriers and the representatives of the employees in train and yard service about crew consist during the proceedings of the Presidential Railroad Commission? Crew consist was discussed, wasn't it? A. You mean in the executive sessions?

Q. Well, in the hearings, in the proceedings before the Commission. A. Oh, yes. But I understood your question to mean that we had private discussions.

Q. No, no. I mean you discussed the dispute, the crew consist dispute. A. It was before the Commission, absolutely, yes. It was considered by the parties who were [131] concerned with that dispute.

Q. There were other disputes before the Commission? A. Yes, many of them.

Q. The crew consist dispute was one, and it was considered too like the others? A. That is correct.

* * * * *

[132] Q. So that crew consist got the attention of the carriers and the representatives of the employees before and during the proceedings of the Presidential Railroad Commission; isn't that right? A. Oh, yes.

Q. Then following that, the next thing that happened with further negotiations leading up to or the invocation of mediation—there were negotiations between the parties

with respect to crew consist between the time the Presidential Railroad Commission made its report and the invocation of mediation? A. Well, there weren't very many negotiations. The unions just said 1 and 2 and wouldn't talk about the PRC report. There were several discussions.

Q. You talked about them. You had a report, the Commission's report was— A. February 28, 1962. It doesn't show in the report, but that is when we delivered it to President Kennedy.

Q. Right. That was the date it was delivered.

Then there was discussion of the crew [133] consist dispute between representatives of the carriers and representatives of the employees subsequent to that? A. Yes. I thought you said negotiations. Now that you have modified it to discussions, yes.

[134] Q. And the problem was a continuing one, the dispute was a continuing one, and it was talked about; let's put it that way. Would you go that far? A. Oh, I talked about it; I should say I did talk about it. I still talk about it.

Q. You say that every time you mentioned it—who was the president of the Brotherhood at that time, was it Mr. Kennedy? A. Park Kennedy was the president, but he did not participate in the negotiations.

Q. Who did you talk to or what representative of the Brotherhood of Railroad Trainmen or Order of Railway Conductors and Brakemen or Switchmen's Union of North America did you as the representative of the carriers talk to about crew consist following the Presidential Railroad Commission? A. We talked with Mr. Sites and with Mr. Satterswhite who was assistant president. I am pretty sure Mr. Luna got in on it. As I recall, Mr. Luna succeeded Mr. Kennedy just about that time.

Q. Just about that time? A. Yes.

Q. So, in other words, it was discussed, the [135] railroads proposed disposing of it on the basis of the report of the Presidential Railroad Commission? A. And the unions said no.

Q. And the unions said no. And you talked about that not just once, but many times, is that right? A. Well, we talked about the whole report. We really didn't do much talking about individual issues. The representatives of the employees, certain representatives were lambasting the members of the Presidential Railroad Commission. And when we would meet we would want to talk about issue by issue and they would say we want no part of it. That was about all there was to it.

Q. It was still discussed? A. Yes, if you call that discussion.

Q. Now that discussion continued and mediation was later invoked? A. That is correct.

Q. By both parties? A. Yes, I think that is right.

Q. Was crew consist the subject with which the Mediation Board was concerned or did it ignore it? [136] A. No, the Mediation Board like the Presidential Railroad Commission fulfilled their duties, accepted their responsibilities, but they were woefully unsuccessful in their mediatory efforts.

Q. During the time the dispute was in mediation and it was one of the things that was in mediation? A. Yes.

Q. The mediation board undertook to secure an agreement between the unions representing train and yard service employees and the carriers with respect to crew consist, didn't it? A. We never separated, Mr. Haley, representatives of the unions. All five were there at all times. And outside of the firemen issue we did not at any time get into realistic discussions concerning any other issue.

Q. You mean realistic because you mean you didn't single it out for particular attention? A. I think that is right.

Q. But it was considered along with the other things maybe to a lesser degree? A. Let me say it this way: Practically all of our discussions dealt with the PRC recommendations [137] and what we ought to do about them. Now there was very little discussion of individual issues.

Q. But there was some? A. There was some, yes, sir.

Q. There was some of crew consist? A. Oh, yes.

Q. Just like there was some of self-propelled machines? A. That is correct.

Q. There was some of how to dispose of the last yard engine that became one of the secondary issues? A. We discussed the two Section 6 notices.

Q. And the proposals of the Presidential Railroad Commission with respect to that? A. Well, whenever the unions would stand for that, the members of the Emergency Board would attempt to talk about the PRC.

Q. The Emergency Board really—well, I am talking about the Mediation Board. We haven't gotten to the Emergency Board yet. The Mediation Board. A. Oh, the Mediation Board, well, they didn't do any talking about anything.

[138] Q. They just came in one door and went out the other? A. Yes, very hurriedly on occasion.

Q. They didn't try to perform their duty to mediate the dispute? A. It is pretty hard to enter into a meaningful discussion when one side simply says no.

Q. That was your view of the activities of the Mediation Board? A. Yes, I witnessed it.

Q. So then, the National Mediation Board, though, finally determined that it could not resolve the issues that were made by the railroads' November 2, 1959 notice and the union's September 7, 1960 notice as implemented? A. That is correct.

Q. As I understand it, the carriers offered to arbitrate and the unions refused? A. That is correct.

Q. And of course then the Mediation Board terminated its services? A. Correct.

Q. Your position is that the Mediation Board just treated it perfunctorily? [139] A. No, no. I certainly do not wish to leave that impression. They tried hard enough to talk, but the representatives of the unions wouldn't talk. They just simply said no.

Q. Who handled the mediation? A. I think Lev Edwards did most of it.

Q. Did he talk separately to the carriers? A. He talked with me many, many, many times.

Q. Do you know whether he also talked with representatives of the employees, the unions? A. I know that he did.

Q. He did? A. Yes.

Q. So then, he was a go-between at times, at least, between the carrier representatives and the union representatives? A. Well, usually it was sort of crying on my shoulder when he talked with me that he had nothing to report except no.

Q. At least he told you he had talked to the representatives of the employees? A. Yes, he told me that he was meeting them.

Q. Were there face to face talks across the table? [140] A. Yes, but not to any great extent.

Q. In other words,—but there was discussion back and forth? A. Well, we talked, if that is what you mean. I have already told you what was said. It wasn't very interesting.

Q. Then, of course, the Mediation Board terminated its services and the railroads then announced their intention to resort to self-help, put their rules into effect? A. That is correct. No, Mr. Haley. We first advised the unions that we were going to make effective the recommendations of the Presidential Railroad Commission, not our rules.

Q. Not your November 2, 1959 proposal? A. That is correct.

Q. With the termination of mediation you felt, and as you understood the law to be or the Railway Labor Act at that time, the carriers had the right to exercise self-help at that time? A. Assuming that an emergency board would not be created.

Q. So you announced your intention of taking [141] unilateral or resorting to self-help? A. That is correct.

Q. It was your understanding that that was perfectly legal? A. That is right.

Q. I believe, if I have the dates right, the Mediation Board terminated its jurisdiction on July 16, 1962 and the promulgation was set for 30 days thereafter? A. Yes, I believe those are the correct dates.

[142] Q. And then the next thing that followed was the unions filed a suit in the court in an attempt to enjoin the carriers' exercise of self-help. A. That is right.

Q. Now then at that time you were, of course, the chairman of the National Railway Labor Conference? A. No.

Q. Who was? A. We didn't have it.

Q. You didn't have it? A. Not until January 1, 1963. At that time I was chairman of the Western Carriers Conference Committee.

Q. And there were two other carriers conference committees? A. That is right.

Q. The Southern and the Eastern? A. That is correct.

Q. And was there any, at least at this time, titular head of the three conference committees? A. At that time I acted as spokesman for the railroads.

Q. For the three? A. That is right.

[143] Q. Did you have legal advice available to you at that time? A. Oh, yes.

Q. Who were your lawyers at that time? A. Well, Howard Neitzert was our general counsel, but we had several others.

Q. Let's see. There was Mr. Neitzert and– A. Lucente.

Q. Yes, Martin Lucente. A. And, well, we had several from the railroads.

Q. Your son Jim? A. Yes, he assisted in that case.

Q. He was in that case, too? A. Yes, he was.

Q. And he, of course, is now a vice president of personnel of the Chicago and North Western, one of the railroads involved here? A. That is correct. He stayed on our side.

Q. And, of course, eventually the case that started in this court at that time, or in that case you took the position that the procedures of the Railway Labor Act having

been exhausted and no Emergency Board having been appointed, the railroads were free to exercise self-help. [144] A. Yes

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Q. And then, of course, as soon as the case became final after the Supreme Court's decision, the President did establish an emergency board? A. That is correct.

Q. And that is Board No. 154? A. That is right.

Q. And that board considered the question [145] of crew consist, didn't it? A. That board considered all of the issues that were before it.

Q. Of which crew consist was one. A. That is right.

* * * * *

[148] Q. And then following that crew consist became the subject of further discussion between [149] representatives of the carriers and representatives of the unions concerned or representing yard and road service employees, between that time and the time Public Law 88-108 was enacted, during that summer, was it not? A. Well, we had some discussion.

Q. It was talked about more than casually in the talks that preceded the enactment of Public Law 88-108, wasn't it? A. Well, as you know, I think you know, Secretary of Labor Wirtz became involved, and Under-secretary Jim Randalls, and there were discussions with the parties separately and jointly. Certain proposals were submitted, one by the Secretary of Labor.

Q. And those proposals were discussed by the carriers and by the carriers and by the employees' representatives? A. Yes.

Q. They were? A. Oh, yes. We accepted the proposal made by Secretary Wirtz and the unions rejected it.

Q. Nevertheless they were discussed and considered. [150] A. I am not sure about considered. I know we considered them. What the unions did, I don't know because—

Q. You weren't there. A. The answer was the same all during those years.

Q. Then, of course, came Public Law 88-108? A. That is correct.

Q. And crew consist was testified about before the committees of the Congress that considered the legislation that became Public Law 88-108? A. Yes. I testified before the Senate Committee and the House Committee on several occasions.

Q. And so did representatives of the unions? A. Yes, I am pretty sure they did.

Q. I am sure you were there and heard it. A. I heard part of it anyway, oh, yes.

Q. So you each spoke your piece before the committees in Congress? A. That is correct.

* * * * *

[158] Q. Mr. Wolfe, are you aware that the Chicago and North Western Railroad is one of the last holdouts in this whole thing? Everybody else has been able to reach agreement with us except this outfit. A. Well, I think the–

Q. Are you aware of that? Just answer that [159] one question. A. My testimony only covers the strikes, the insistence on 1 and 2, the demands that you have on national agreements locally negotiated, entirely unrealistic. That is all covered in my affidavit and my oral testimony.

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Q. Then, of course, you were the chairman of the National Railway Labor Conference throughout and subsequent to the effective period of the award of Board 282? A. Yes, I was.

* * * * *

[161] Q. In June or July of 1965, the then Brotherhood of Railroad Trainmen commenced serving through its general chairman, notices under Section 6 of the Railroad Labor Act on various railroads seeking a rule to become effective on January 25, 1966, with the expiration of the award of Board 282 for a minimum crew consist. A. That is right.

[162] Q. And that, of course, is one of the notices that is involved in this litigation that we are in Court about here today? A. Yes.

Q. And when those notices were served by the railroads, then the railroads receiving them, I take it, reported the fact to the National Railway Labor Conference, your office here in Chicago? A. I believe you said, Mr. Haley, served by the railroads?

Q. Served by the unions. A. Served by the unions, yes.

Q. Yes. Thank you for correcting me if I said that. A. Yes, that was very promptly reported to me.

Q. Reported to you because at that time you, as the representative of the National Railway Labor Conference, had under a power of attorney the authority to act for the railroads with respect to this dispute? A. Oh, yes.

Q. So then you told, your response to the railroads was, and I take it your direction to the railroads, was don't negotiate on those notices [163] served by the union, is that right? A. I told the railroads that I thought the notice were premature and to keep me advised as to what was going on.

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[164] Q. You did tell them not to negotiate? A. I did so tell them.

Q. Right, and on your instructions the railroads refused to negotiate on those notices? A. That is absolutely correct.

Q. And then in December, following the refusal of the individual railroads, on your instructions to negotiate with the General Chairman representing the Brotherhood, the Brotherhood then sought the services of the National Mediation Board with respect to the dispute arising from those notices? [165] A. That is right.

Q. And did you oppose the National Mediation Board? Did you instruct the railroads that had been served with the notices to oppose the National Mediation Board entering the dispute? A. I opposed the National Mediation Board en-

tering the dispute because I felt the notices were premature and I advised all the railroads that I represented to that effect.

Q. But nevertheless the National Mediation Board did assume jurisdiction of the dispute arising from the union's Section 6 notices that were served in June and July of 1965? A. That is right.

Q. Then after that, in December of 1965, you instructed the railroads you represented to serve a counter-notice under Section 6 of the Railroad Labor Act on those General Chairmen who had served Section 6 notices on the railroads in June and July earlier? A. That is correct.

Q. And you also advised the railroads in serving those notices that their proposal should have two proposals in it, I should say: One, for the management to have the unrestricted right to [166] determine the size of crews and the craft to constitute the crew, and, second, national handling. A. That is correct.

* * * * *

[167] THE COURT: Why did you take the position that theirs were premature and yours not premature, or did you merely serve your notices to get your side before the mediation?

THE WITNESS: Yes, your Honor. We felt certain that the question of prematurity would eventually be in litigation, and if it should have resulted in a decision against our position we wanted to have our counter-proposal.

* * * * *

[168] BY MR. HALEY:

Q. So, in other words, it was a hedge against your being wrong about the validity of the union's notices? A. It was a hedge against erroneous Court decisions.

* * * * *

[169] Q. Then, of course, the general chairman of the Unions on which the railroad served those notices also refused to engage in national handling of them? A. I think all of them did. Undoubtedly they would have struck.

Q. Then on behalf of those railroads that had served the December 1965 notices, you applied for the services of the National Mediation Board? A. Yes, for all of them.

Q. For all of those that had been served with notices? A. Yes.

Q. And that was along about early January of 1966 that you applied—not early, late in January 1966 or early February you applied to the Mediation Board? A. Well, it was in the late winter of 1966.

Q. Before the expiration of the award. A. I am not too certain of that, Mr. Haley. Let me look at the record.

Q. We can get it. It was in the Atlantic Coastline case. A. Yes.

[170] Q. I am sure the date shows up in the Atlantic Coastline record. Anyway, you did, like the unions had earlier done, ask for the services of the Mediation Board? A. Oh, yes. The Mediation Board had accepted jurisdiction of the dispute growing out of the unions' notices, and on that basis I wanted the two disputes, our notice, their notice, handled concurrently if they were to be handled.

THE COURT: You served the notice and asked for the Mediation service.

THE WITNESS: That is right, your Honor.

THE COURT: Both of you were trying to get in the same position.

THE WITNESS: Yes, sir.

THE COURT: Both of you gambling on what a court might do.

THE WITNESS: Yes, that is all there was to it.

* * * * *

[171] BY MR. HALEY:

Q. Well, Mr. Wolfe, the National Railway Labor Conference, through its attorneys, and perhaps you, opposed the National Mediation Board handling the disputes arising from these notices, the unions' June and July notices, the railroads' December notices on a railroad by railroad basis. But you formally opposed the Mediation Board doing that, and the Mediation Board, the three members of the Board,

conducted a hearing at which the railroads were represented by, I believe, your son James and the Shea and Gardner firm? A. As I remember.

Q. In December? A. Yes. I know all about it. J. R. Wolfe and Chuck Hopkins, and I think we did have a member of the Shea firm there. I know—

Q. I think Mr. Shea was there. A. I know J. R. Wolfe and Charles Hopkins represented us.

Q. And the position the railroads were taking [172] in that was that the Mediation Board should not handle the disputes on a railroad by railroad basis but instead should handle them concurrently on a national basis. A. Just as they handled all other disputes for years and years.

Q. But that was your position, is that right? A. Yes. I am giving you my position.

* * * * *

[173] Q. And the Mediation Board denied or refused to handle it on a national basis and concluded to handle it on an individual railroad basis? A. Well, they never made a ruling to that effect, Mr. Haley. They simply went ahead and handled it on a local basis.

Q. It is my understanding that they had made a ruling. Now your son, Jim, was one of the lawyers that was representing the National Railway Labor Conference at that time at that hearing? A. That is correct.

Q. Perhaps he can give us the answer, if not, I think I have it.

But in any event whether they made a formal decision or not, they accepted jurisdiction [174] of the disputes on a railroad-by-railroad basis? A. They accepted it on three railroads to start with.

Q. Three railroads to start with? A. That is correct.

Q. That was the Missouri Pacific, the L&N and the Atlantic Coast Line, wasn't it? Or the Boston & Maine. A. The Boston & Maine, as I recall.

Q. There were four, then, weren't there? The Boston & Maine, the Missouri Pacific, the Southern and the Atlantic Coast Line?

* * * * *

Q. Then it ended up, though, with the Mediation Board accepting jurisdiction on really a notice-by-notice basis because some railroads had several [175] districts on them, isn't that right? A. I think they did that on the Union Pacific.

Q. In other words, they would accept it on a district-by-district basis and give the case a docket number like A-1234 for the unions, the dispute arising from the unions' notice, and the same number with a sub-1 for the dispute arising from the railroads' notice; is that right? A. I don't recall those details, but it could be.

Q. About this same time in January of 1966, just before the 25th of that month, did you instruct your attorneys, Messrs. Shea & Gardner in Washington to file what became known as the Akron, Barberton and Belt case? A. Yes, I did.

Q. The Chicago & North Western that is involved here was one of the railroads that was a party plaintiff in that case? A. I think that is correct.

Q. Along with the Atlantic Coast Line, the Boston & Maine, the Des Moines Union, the Missouri Pacific, the Southern, the UP and a hundred and some-odd others? A. No. As I recall there was a total of 80 railroads.

[176] Q. In the Akron, Barberton and Belt case, that was all of them that were subject to the Award of Board 282, was it not? A. No, the Eastern Railroad subject to the Luna agreement were not.

* * * * *

[178] Q. Did the National Railway Labor Conference direct or instruct the individual railroads it represented both in the Akron, Barberton and Belt case generally in the crew consist matter not to engage in further negotiations or mediation under the notices after the Akron, Barberton and Belt case was filed and until Judge Holsoff ruled in March with respect to the validity of the unions' June and July notices? A. That is correct, Mr. Haley. As I stated to you earlier, and which the Court made some comments, we had a reason for doing that. In addition, when the notice of the

employees was served in June, much of the procedures of Article III of the Award were being conducted, that is, special boards and negotiations to take off employees. And for those two reasons, primarily, our contention that the notice was premature we did instruct that there be no negotiations.

Q. And the North Western which is involved here followed your instructions and did not conduct any negotiations? A. To the best of my knowledge my instructions were complied with on all railroads.

[179] Q. So they were all in the same boat.

Now then, Judge Holsoff made an order in the Akron, Barberton & Belt case along in March, the end of March I believe it was, in which he ruled that the notices that were served by the union in June and July of 1965 and by the railroads in December of 1965 became valid notices with the expiration of the Award of Board 282 on January 25, 1966; is that right? A. That is correct.

* * * * *

[180] Q. Then, of course, then you did instruct the railroads, including the North Western that they should then or could then have what you described as the initial conference with the railroads—with the general chairman upon whom they had served the notice and from whom they had received the Section 6 notice? A. Yes, following what the Railway Labor Act requires they hold their initial conference.

Q. That in that conference they should refuse [181] to negotiate with the individual general chairmen except on a national basis? A. We urged the individual railroads to insist upon national handling.

Q. In other words, either national handling or no negotiations on an individual railroad? A. I don't think we went that far. We thought the case should be handled on a national basis and we so informed the railroads.

Q. So as a result of that the general chairmen, each of the chairmen who had served the notice, insisted on handling the notices on the individual property. The railroad

insisted on negotiations, if any, to be on a national basis, as a result of that there were none? A. Well, the "if any" applies both to local handling and national handling.

Q. So as far as you know no negotiations on the merits? A. The union said you will either handle it locally or there will be no negotiations. We said you either handle it nationally or there will be no negotiations at this time.

Q. And the result of it was there were no negotiations? A. I think that is correct.

[182] Q. Then the Mediation Boad, though, in the meantime commenced active mediation on certain of the railroads? A. That is right.

Q. And those certain of the railroads were the ones that you mentioned awhile ago, the Boston and Maine, the Atlantic Coastline, the Missouri Pacific, the Southern,—not the Southern— A. Des Moines Union.

Q. Pardon? A. Des Moines Union.

Q. The Des Moines Union, The C&O, the L&N,— A. Well, they all came in later.

Q. Right. But then is when you and Mr. Luna had the meeting in August of 1966, was it? A. August 30th, 1966.

Q. And got into what we called in the Atlantic Coastline Case the super mediation that was to go on, is that what we called it? A. Special mediation.

Q. Special mediation. In other words, you designated a member of the National Railway Labor Conference, the Mediation Board provided a mediator, Mr. Luna designated a vice president or a deputy [183] president of the union— A. A grand lodge officer, yes, sir.

Q. —to work with the general chairman representing the Brotherhood of Railroad Trainmen on each of those four railroads? A. That is right.

Q. And crew consist was negotiated then, wasn't it? A. It was discussed.

* * * * *

[184] * * * [C]rew consist got a thorough airing again in that super mediation on those particular railroads, didn't it? A. No.

Q. It didn't? A. No. It was the same thing we have had since 1959. The unions say 1 and 2 or else.

Q. It got enough of a negotiation that Judge Holsoff found the negotiations on the Boston and Maine, Atlantic Coastline, Des Moines Union had been conducted in good faith, didn't it? A. I don't recall.

* * * * *

[185] Q. But there were no further negotiations that you know of on the merits after this super mediation that we spoke of in August of 1966 on those few railroads? A. Not that I recall.

Q. You were getting reports from the individual railroads you represented when anything occurred on it, you as chairman of the National Railway Labor Conference? A. That is correct.

Q. So nothing more occurred until after certiorari was denied by the Supeme Court in the Atlantic Coast Line and Akron, Barberton and Belt cases in January, 1968? A. Well, yes, after the so-called special mediation I attempted to meet with Mr. Luna as we had agreed to and he refused to see me.

Q. Well, I am talking about negotiations on individual railroads between a general chairman and a personnel officer of that railroad. A. Well now that you have made yourself clear, I think you are correct.

Q. Then in January of 1968 you were still chairman of the National Railway Labor Conference? A. What date?

Q. January 1968. A. No, I was not.

Q. You had retired, that is, for the record, in June or July of '67? A. August 1, '67.

* * * * *

Q. You were succeeded, then, by Mr. Hiltz, is that right? A. That is right.

* * * * *

[189] Q. Now did you, Mr. Wolfe,—and of course, during the time this litigation was going on or even before that, I believe you testified about the making of the Luna-Saunders agreement and the Luna-Touhy agreement as they have become known? A. Yes, I know about the so-called Luna

agreement. Someone added Saunders along to it. I still refer to it as the Luna agreement, and it is so referred to in my affidavit. I think it is the same agreement.

Q. Now that agreement was made January 29th, 1965, that was six months before the union served its June and July 1965 notices and almost a year before the expiration of the award of Board 282? A. That is correct.

[190] Q. That agreement—there was some question about it yesterday, it has now been put into evidence—as I count it that agreement covered some 33 eastern railroads, did it not? A. Well, Mr. Haley, it was the Pennsylvania, the New York Central, the Erie Lackawanna, the Chesapeake and Ohio, I recall, and most of those—

Q. The Baltimore and Ohio. A. Or the Baltimore-Ohio, one of the two—and most of the others were subsidiary lines of those larger railroads. Little railroads.

* * * * *

[197] Q. Following the denial of certiorari in the Akron, Barberton and Belt Line and the Atlantic Coastline cases in January of 1963, were you sufficiently in contact with the situation to know that the only strike which was authorized by the union was against the Missouri Pacific and Texas Pacific? A. The first one?

Q. The first one. The Missouri Pacific and the Texas Pacific. A. Was in the Atlantic Coastline?

Q. Now the Atlantic Coastline strike, as I understand it, the Atlantic Coastline promulgated and the union struck in retaliation, but the union did not initiate. The only exercise of self-help initiated by the union first was against the Missouri Pacific and the Texas and Pacific, and then as a defense against the Atlantic Coastline's promulgations? A. You asked me if I was sufficiently familiar to answer your question as to whether the Missouri Pacific, the Texas and Pacific were struck. I know they were struck.

Q. Right.

* * * * *

[200] Q. On the day the L&N was struck first, which was the 8th of November, a year ago, the President appointed Emergency Board 172? A. That is right.

Q. We all participated in that, you, me, Mr. Beers, Mr. Dempsey, Mr. Shea, and we went through—we gave crew consist another good airing there on the L&N, IC and Belt, didn't we? A. Yes, we had an emergency board hearing.

Q. If fully developed the position of the [201] railroads and of the union, didn't it? A. Well, you said it did.

Q. Do you disagree with that? A. No, I can't say I disagree.

Q. Would you say there is any significant difference between the IC, L&N and the North Western? A. Oh, yes, there is a great difference.

Q. A great difference. A. As the record will show.

Q. Right. O.K.

In other words—now then, after the Emergency Board there was one more strike called against the L&N. A. And then the Illinois Central.

Q. Then the Illinois Central. And, of course, we both participated in the litigation growing out of the L&N strike. A. Yes, we did.

Q. That was the one we have been talking about as the Nasvhille case. A. I beg your pardon?

Q. That was the Nashville case? A. Nashville, yes.

* * * * *

[202] Q. Can you tell us the provisions of the various agreements that have been made—first, how many agreements and second, what they provided?

THE COURT: Could you just give us an estimate as to whether it was one or two or twenty, just an estimate, your best estimate based on your knowledge.

[203] THE WITNESS: It will be a guess, your Honor, because I am really not—

THE COURT: Well, it will be an educated guess.

THE WITNESS: Well, I will say maybe as many as a hundred or 120 agreements. But Mr. Haley's question was two-fold, as I understood it.

BY MR. HALEY:

Q. There were two questions. I tried to separate them. How many and do you know what they provide? A. Well, I know about many of their agreements, not all, of course. I would view all of the agreements together as almost the same as a national agreement, 1 and 2.

* * * * *

[212] Q. So there had been the matter of crew consist, I believe you testified, I think it had been included in notices or as one item among several items that had been included or previously included in notices that went to national handling. A. That is right.

Q. But the crew consist issue had been dropped from every one of the notices in which it had been included as one of the items when those notices were [213] resolved nationally. A. That is right. In all of those cases a great many issues were dropped because they just didn't have the time to do like the presidential railroad commission did.

Q. For whatever the reason was, though, they were dropped and never became a matter of national agreement? A. That is right.

* * * * *

[213] REDIRECT EXAMINATION

BY MR. SCHMIEGE:

Q. Mr. Wolfe, Mr. Haley referred to certain negotiations and mediation that took place after the Presidential Commission made its recommendation and before Public Law 88-108 was enacted, and he referred to certain discussions that took place over crew consist during those negotiations and [214] mediation sessions. Were those discussions on crew consist or were they on procedure? A. Entirely procedure. We never at any time discussed how many men should be on any particular run.

* * * * *

Q. Mr. Haley also referred to the fact that during the Presidential Railroad Commission you participated in certain negotiations on crew consist. During those negotiations or discussions, did you refer to the Chicago and North

Western at all? A. Oh, no, we didn't refer to any railroad.

Q. During the negotiations or discussions between the PRC and Emergency Boad No. 154, was the matter of crew size on the North Western discussed [215] at all? A. It was not.

Q. During the negotiations or mediation that was conducted by Emergency Board No. 154, was the matter of crew size on the North Western discussed? A. It was not.

Q. During the hearings before Arbitration Board No. 154 and during the executive sessions of that board, was the matter of crew size on the Chicago North Western discussed? A. Certainly there was no discussion of crew size on the North Western in executive session, and I do not recall whether we introduced any exhibits before the Arbitration Board in connection with operations on the North Western.

* * * * *

[217] JAMES R. WOLFE

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCHMIEGE:

Q. State your name and address for the record, please. A. My name is James R. Wolfe. My address, business address, is 400 West Madison Street, Chicago, Illinois.

Q. By whom are you employed? A. I am employed by the Chicago & North Western Railway Company.

Q. What is your position with the Chicago & North Western? A. I am Vice President, Labor Relations of the [218] railroad.

Q. Will you tell us, please, what your duties are and your responsibilities as Vice President of Labor Relations? A. Yes. As Vice President, Labor Relations, I am in charge, I am responsible for collective bargaining with all of the labor organizations that hold contracts on our railroad. I also am responsible for the North Western's participation

in national bargaining affairs. I am also responsible for the collection and assemblage of data and agreements which are made by other railroads in the industry.

Q. When did you become Vice President of Labor Relations for the North Western? A. I was elected Vice President, Labor Relations, the first week of April, 1968. However, because of other duties that I had at my prior position, I did not officially join the North Western until June 1, 1968. However, between April, the first week of April and June, I did participate in certain collective bargaining matters, including certain discussions on crew consist.

Q. And what was your prior experience in the railroad industry? By that, I mean your experience [219] prior to coming to the North Western. A. Yes. After graduating from law school in 1953, I joined the Burlington Railroad in their law department as an attorney in the litigation section. I tried personal injury matters, loss and damage matters, and whatever liaison was necessary between the law department and the labor relations department, with a few years off for Army duty.

In 1959 I resigned from the Burlington and was appointed a member of the National Railroad Adjustment Boad, and I was the Southeastern Carriers' member of that Board. I wore two hats at that time. I was also the Southeastern Railroads' counsel in national labor cases, and in that capacity I appeared before your Honor once or twice.

In 1964 I was appointed general attorney of the National Railway Labor Conference, the national bargaining arm of the railroads, and subsequent to that was made general counsel of the National Railway Labor Conference, the position I held just before coming to North Western.

* * * * *

[220] The North Western is really a collection of railroads that were merged into it, and when these separate properties were merged into the North Western, the employees retained their individual labor contracts. So that on the prior districts we have separate general chairmen with separate agreements.

* * * * *

[226] Q. Mr. Wolfe, did the Chicago and North Western and the Brotherhood of Railroad Trainmen exchange Section 6 notices on crew consist in 1965? A. Yes, they did. In July of 1965 the North Western along with virtually all of the Class I railroads was served with notices which were virtually identical with the notices that the organizations [227] served during the 1959 notice-serving period, and the railroad subsequently served counter notices to that notice which were virtually identical with the November 2nd, 1959, notices that the railroads had served.

* * * * *

[230] Q. Was the Chicago and North Western one of the railroads that took the position that the unions' notice was premature and that there was no duty to bargain during the term of the award? A. Yes, it was. Of course, that position was based on the fact that the award was still in existence and we could still operate under the procedures of the award. But we took the position the same as the other railroads did under the direction [231] of the NLRC.

Q. Was there in fact any meetings on that notice in 1966? * * * A. The initial conference was held in January of 1966.

Q. On what day in January? A. January 18th.

Q. So that was prior to the expiration of the award? A. That is right.

* * * * *

Q. Was there a subsequent meeting in 1966 on those notices? A. Yes, there was. I think, and the previous witness has testified, this matter was handled in court before the United States District Court for the District of Columbia. In the spring of 1966, I think in March, that Court entered a preliminary [232] order holding that the notices were premature and that any meetings held prior to the expiration of the award were ineffective. So the railroads, including the North Western, when that order was issued immediately wrote the unions suggesting that we come in and meet, sit down and discuss both their notices and ours.

Now that letter was sent out in March. The unions refused to come in and meet.

* * * * *

The unions said it was a preliminary order and it wasn't final; that the matter—in addition, the matter was in mediation and they refused the railroads' offer of negotiations.

THE COURT: What was the date of the expiration under the award?

THE WITNESS: January 25th, as I recall, 1966.

THE COURT: 1966?

THE WITNESS: Yes, sir.

[233] BY MR. SCHMIEGE:

Q. Well, after the unions took this position, did the Court render a final order? A. Yes. In May—and the reason I remember these dates is because I was acting as one of the counsel in that case at that time—on May 31st of 1966 the United States District Court did enter a final order holding the notices premature and meetings ineffective, whereupon the railroads again, including the North Western, wrote the unions and said O.K., the order is now final, please let's come to the bargaining table and meet.

Q. Did we suggest a date for a meeting in that letter? A. Yes, that meeting was in June of 1966.

* * * * *

Q. Did that meeting in fact occur? A. It did in fact occur.

Q. What happened? A. At that meeting the union objected and would not agree to handling the matter nationally, objected and would not agree to handling the railroads' demand [234] concurrently with the unions' demand and insisted upon a restoration of a 1 and 2 crew.

Q. Were there any subsequent meetings in 1966? A. There was a subsequent meeting in August at which time the union simply repeated the position that they took in June.

Q. Were there any conferences in 1967? A. No, there were not. The National Mediation Board at that time had

jurisdiction of the case and in compliance with its long-standing procedure—The Atlantic Coastline litigation, your Honor, was pending at that time, and the Mediation Board simply held the matter in abeyance.

Q. Did the Chicago and North Western make any moves in 1968 to reopen negotiations on this dispute? A. Yes, shortly after the Jacksonville settlement, which was made in February of 1968, several of the railroads that still had to dispose of the crew consist issue and these notices met among themselves, and in order to discuss the [235] various alternatives that were available to them in an attempt to dispose of the issue. And at that time one possible solution to the problems that the representatives discussed was offering the employees themselves additional compensation in return for their increased productivity in working 1 and 1 jobs. The railroads at that time agreed—these several railroads that met—to transmit that offer or that possible approach to the representatives of the employees.

Q. Was there any precedent for that approach? A. Yes, there was. The railroads nationally had made such an agreement with the Brotherhood of Locomotive Engineers which returned to each engineer and addtional $4.00 per day on those jobs where he worked without a locomotive fireman. This was followed—this followed that same precedent and the idea was identical, virtually.

Q. After this meeting between these railroads what particular action did the North Western take? A. Well, the North Western addressed a letter to its collective bargaining representatives, the general chairman, making an offer of the payment of $3.45 a day to the train service employees who worked on crews manned with only one brakeman or one helper.

[236] Q. Could you convert that $3.45 a day into annual earnings? A. Yes. In rounded figures it would amount to about $1,000 a year to each man.

Q. This offer that was made, as you stated, to the general chairman, was there any advice of that offer given to the individual employees? A. Yes. Because this was an

issue involving jobs against additional compensation to the individual employees the representatives of the railroads decided to advise the employees themselves of the offer and copies of the letter were sent to all train and yard service employees.

Q. Would you tell the Court, please, how the union replied to that offer? A. The general chairman on the North Western replied in writing summarily rejecting the offer, and in the letter stated that it was not within their authority to bargain on matters on that kind of a proposal.

Q. I now show you what has been marked for identification as Plaintiff's Exhibit No. 13, would you identify that document, please? [237] A. Yes, this is a written memorandum on Brotherhood of Railroad Trainmen stationery dated March 14, 1968 signed by Gerald R. Maloney, General Chairman, who was and is General Chairman of the former Brotherhood of Railroad Trainmen, now United Transportation Union Trainmen on the North Western Proper. This is the written rejection of the North Western's offer of an additional $3.45 a day compensation to each employee working on a 1 and 1 crew.

MR. SCHMIEGE: Plaintiff's No. 13 for identification is offered into evidence, your Honor.

* * * * *

[238] THE COURT: It may be admitted.

(Whereupon said document heretofore marked as Plaintiff's Exhibit No. 13 for identification, was received in evidence.)

BY MR. SCHMIEGE:

Q. After the North Western received this reply from Mr. Maloney what action did it take regarding this offer? A. the North Western dropped the matter at [239] that time because of the rejection by the employees. However, subsequently—in fact, in our mediation conferences, which took place in May, June and July of 1969, I simply repeated the offer once more and it again was summarily rejected.

Q. When you became Vice President of Labor Relations for the North Western in 1968 were you able to reopen talks on crew consist? A. Yes, talks were reopened. They were reopened in this way: Mr. Heineman who is Chairman of the Board of North Western and Mr. Provo who is the President of the North Western met Mr. Luna on March 19, 1968 at a luncheon meeting for the purpose of discussing the crew consist issue. At that time Mr. Luna took the position that the North Western was in effect losing money on 1 and 1 crews because they were inefficient for working long hours, et cetera. Mr. Heineman and Mr. Provo said well, we will make a study to see if that proves to be the case. And Mr. Luna said that he had data and they would supply that data to the railroads subsequently after the railroad study was made. This meeting produced an arrangement to meet—for me to meet with the [240] North Western general chairmen during the months of May, June, July and August of 1968 on the crew consist subject and what we tèrmed a bona fide and honest attempt to sit down and try and settle the subject of crew consist.

Q. When was the first of those meetings actually held? A. The first such meeting was on May 16, 1968.

[241] Q. What was accomplished at that meeting? A. At that meeting we primarily accomplished three things: No. 1, we handed the general chairman the results of the studies that Mr. Heineman and Mr. Provo had agreed with Mr. Luna that they would perform. We described exhibits in the study which was in a bound book, to the general chairman explaining to him that the exhibit material confirmed and corroborated the railroads' position that the 1 and 1 crews during the past three years in actual operation had been extremely efficient and contributed to North Western's productivity.

Secondly, we proceeded to identify certain of the jobs that were working 1 and 1. Now this identification followed an understanding between Mr. Maloney and I as to the procedure we would follow in the talks that were to come along subsequently. We agreed—Mr. Maloney said

that he would prefer to discuss first the yard jobs on the North Western District proper and then follow that with a discussion of the road jobs.

Q. That would be on just one of the railroads' five or six districts? A. That is on one of our districts. When I [242] say the C&NW district I mean the district which was originally the North Western before we started adding to it with these other railroads.

However, in discussing the yard jobs Mr. Maloney stated to me that there was no sense in even identifying or discussing the yard jobs in the Chicago terminal area which we yet operated 1 and 1 for the past three years because they must be returned 1 and 2 without question or discussion.

Q. How many yard jobs are there in Mr. Maloney's district, approximately? A. Well, we have hundreds, but insofar as those we were authorized to operate 1 and 1 there were approximately 60.

Q. What percentage of that or proportion of that would be in the Chicago terminal? A. Well, I misspoke. We have 60 outside of Chicago and over 20—between 20 and 30 in the Chicago terminal area.

Q. So approximately one-third of the jobs in Mr. Maloney's district are in the Chicago terminal? A. That is right.

Q. When were the next conferences held on crew consist? [243] A. The next informal meetings that Mr. Maloney and I held were in the month of June, 1968, June 12th and June 20th.

Q. What was Mr. Maloney's position on the yard jobs in his district at those meetings? A. On those two dates Mr. Maloney, without any sizable interruption from me, proceeded to identify each of his jobs and tell us what he was willing to do as to each of them. When he concluded on the 20th of his 80 some-odd jobs he agreed that 76, approximately, we would have to restore—add the second man, and he would permit us to continue to operate four with a short 1 and 1 crew.

Q. Did he make any mention at those meetings of the jobs in the Chicago terminal? A. He persisted in continu-

ing to emphasize that there was no sense in discussing them or mentioning them because they must without discussion be returned to 1 and 2.

Q. What type of explanation did he give for his demand that these jobs must be returned to 1 and 2? A. None.

Q. What was your reply to this demand? [244] A. My reply was that we had successfully operated the jobs with one helper over the course of the last three years, the study that we had conducted illustrated that they were extremely productive and efficient, and I would like some reason as to why we should put the second demand back on.

Q. To make it clear for the Court, at what meetings did you present this reply; was that at these first two meetings? A. Well, at the first two meetings, as I said—and this was in accordance with the procedure we had agreed to—Mr. Maloney mentioned his jobs and said what he was willing to do. The meetings that followed on the 17th of July and the 6th of August, I went over the same jobs in some detail and answered Mr. Maloney in the course of the following two meetings.

Now I might add, on the meeting of June 20th, Mr. Maloney was accompanied by four of his local chairmen who proceeded to corroborate Mr. Maloney's view that these jobs all had to be returned to 1 and 2.

Q. In these discussions was there any reference to the guidelines of Arbitration Board 282? [245] A. Not by Mr. Maloney. In fact, he insisted that we not refer to 282 or use the guidelines. In my description of the jobs, their characteristics, the conditions that each job was confronted with, the climatic conditions, et cetera, I used and mentioned the guidelines quite often. Of course, I had a study conducted by our operating department which gave me factual data on the number of cars handled by each job, the overtime worked by each job, the technological improvements that had been installed since the jobs were operated 1 and 1, the climatic conditions at the area where the job was operated, the nature of the assignment, whether in yard

service, for example whether it was an industry job, a lead switching job, a hump job, a trimmer job, et cetera; all of this I gave to Mr. Maloney to illustrate to him our position.

[246] Q. At the conclusion of these four meetings in 1968 that you had with Mr. Maloney, how many of the jobs in his district had you discussed? And by that I mean both road and yard jobs. A. We discussed no road jobs at all. We discussed his yard jobs outside of the Chicago district.

Q. You have mentioned that at the July 17th meeting Mr. Maloney appeared with four of his general chairmen. Who was present at the August 6th meeting? A. At the August meeting Mr. Maloney was accompanied by a grand lodge officer, Mr. Francis Tuffley, International Vice President of the Brotherhood of Railroad Trainmen who is now Vice President of the United Transportation Union, Trainmen Division.

Q. What did Mr. Maloney have to say at that meeting? A. Mr. Maloney?

Q. Pardon me. What did Mr. Tuffley have to say at that meeting? A. Mr. Tuffley sat with Mr. Maloney, and I did not object to this, although, it was not strictly in conformity with our original understanding that [247] this would be a local North Western affair, and he gave me no notice that Mr. Tuffley was coming. However, I did not object. I know Mr. Tuffley. I have dealt with him before. In any event, Mr. Tuffley simply sat with Mr. Maloney and would make a general comment now and then. However, when I concluded my discussion and told them what we were willing to do insofar as these assignments were concerned, Mr. Tuffley pulled some papers out of his briefcase. He said words to this effect that the North Western is going to have to come along as these have. And I asked him what those were and he indicated that those were agreements made by other railroads.

Q. Did Mr. Maloney make any comment? A. Yes, Mr. Maloney said the North Western is no different than the others, or words to that effect.

Q. What was your answer to that? A. Well, my answer was that we were here, I thought, to negotiate on conditions that existed on the North Western, local conditions, in conformity with Mr. Luna's testimony before the Atlantic Coast Line that this was a local case and not a national case and it was to be determined on the conditions [248] on each railroad.

I also indicated that I had provided the employees with a large amount of factual data on each assignment.

Q. Did Mr. Tuffley make any reply to that? A. As I recall, Mr. Tuffley put his papers back in his briefcase and indicated that he thought it was time to call in the National Mediation Board into this matter.

Q. What was your statement then? A. My statement was I thought this was premature because we had not even discussed all of Mr. Maloney's yard jobs. We had not discussed any of Mr. Maloney's 1 and 1 road jobs. We had not discussed the carriers' proposal in any way shape or form. And I had not even had a meeting with any of the other general chairmen on any of the North Western districts.

Mr. Tuffley and Mr. Maloney amicably shook hands with me and left the meeting.

Q. Did you subsequently hear from Mr. Maloney? A. I did.

Q. When was that? A. The next morning. Mr. Maloney called me on the phone and said they had considered the matter [249] and thought that we probably should discuss our 1 and 1 road jobs and he would be in touch with me in the next several weeks to set a date to discuss them.

[249] * * * * *

DIRECT EXAMINATION
(Resumed)

BY MR. SCHMIEGE:

[251] Q. Mr. Wolfe, I show you what has been marked as Plaintiff's Exhibit No. 14 for identification; would you identify that document, please. [252] A. Well, this is a

letter, a joint letter addressed to Messrs. Walter Callies and Gerald Maloney which is an offer to pay an allowance of $3.45 a day to the train and yard crew members of 1 and 1 crews. It is dated March 8th, 1968.

Q. I now show you what has been marked for identification as Plaintiff's Exhibit No. 15; could you identify that document, please. A. Yes, this is addressed to all conductors and trainmen on the Chicago and North Western. It is simply communicating to the individual employees the fact of the offer of the 8th.

MR. SCHMIEGE: Your Honor, plaintiff's Exhibits for identification 14 and 15 are offered in evidence. These are the two documents that Mr. Haley referred to yesterday as being background to Plaintiff's Exhibit No. 13.

THE COURT: Admitted. * * *

* * * * *

[254] Q. Mr. Wolfe, when we broke off yesterday you had just testified as to a conference on August 6, 1968 and the fact that when that conference ended Mr. Maloney told you that he would call you the next day, and the next day in fact he did call you and promised to call you at some time in the future to reschedule conferences.

Did Mr. Maloney in fact call you at any time in the future to schedule another conference? A. Well, he said on the 6th—or the 7th, I should say—that he would call me within the next several weeks to schedule a conference. He did not. The next meeting, in fact, on crew consist on the North Western did not take place until April 22, 1969. I think I can explain why. In the first place there was a Belt strike in Chicago on the same subject during that period.

Secondly, we were—that is, I was actively negotiating with all of the operating crafts, a work coordination agreement involving the North Western and Great Western merger.

THE WITNESS: You see, your Honor, on [255] July 1, 1968 the Chicago and Great Western Railroad was

merged into the Chicago and North Western. It was extremely important to our employees, as well as to the railroad that we negotiate an agreement involving the protection of affected employees as well as the coordination of work. I handled those negotiations with a few of my assistants and four vice-presidents of the operating unions and all of our general chairmen, and that occupied our time until an agreement was reached on December 19. Now when we finally made an agreement on merger an Emergency Board which had been appointed by the President to investigate into the crew consist dispute on the Illinois Central, the L&N and the Belt was still in progress of conducting its procedures. We decided that we would wait until those procedures had been accomplished.

The day after the Illinois Central made its agreement on crew consist, the Jacksonville type agreement, Mr. Maloney came into my office and we discussed beginning conferences and we settled on the date of April 22nd about a week later as our first conference date.

[256] Q. And was a conference in fact then held on April 22nd? A. Yes, it was.

Q. And who was present at that conference? A. At that conference the Brotherhood of Railroad Trainmen was represented—of course, by this time it was no longer the Brotherhood of Railroad Trainmen because there had been a merger of the four operating unions into what is now called the United Transportation Union. But this was a meeting involving what had formerly been the Brotherhood of Railroad Trainmen, the United Transportation Union Trainmen Division.

The Union was represented by Mr. Maloney, the North Western District General Chairman, and he was accompanied by Walter Callies, the United Transportation Union conductor general chairman.

Q. At that meeting, that is the April 22nd, 1969, meeting, did Mr. Maloney depart at all from the position he had taken in the last meeting you had with him in August of 1968 that the North Western had to conform to the

crew consist agreements that other railroads had made? A. No, he did not. If I may, I think I can explain what happened in that respect.

[257] That morning, the morning of the 22nd, Mr. Callies, our conductor general chairman, accompanied by Mr. Maloney, met several of the officers of our department on another subject which involved another independent Section 6 notice, your Honor. That conference involved a request by the conductors for a five-day week in suburban service in the Chicago area, and at the end of that conference Mr. Maloney stated to our representatives that he thought he might have an approach to the crew consist matter.

My people told him that they thought it best that he hold that until that afternoon when he was scheduled to meet with me on that subject. So when we met the afternoon of the 22nd, Mr. Maloney started out by saying that he wanted me to understand that the North Western would have to return all of its 1 and 1 crews to a 1 and 2 status; that we would have to conform to the agreements made on other railroads and we could not deviate from it.

He said, in his opinion, he could get by with an 80 per cent return of 1 and 1 crews, and that would conform with what the other railroads had done. He said there is a possibility of doing something like this, he said, you have to put them all back to 1 and 2, and we have to make an agreement [258] to that effect, that after you put them back to 1 and 2, then perhaps you could buy back from me the 25 or 30 jobs in the Chicago terminal area to a 1 and 1 status in return for a five-day suburban week, five-day week in suburban service. He said, however, that he would have to get the approval of the Grand Lodge, namely, he would have to ask Mr. Tuffley, the BRT vice president if he would approve this proposition.

Q. You mentioned that Mr. Maloney said to you that you would have to return 80 per cent of the jobs which he described as being what was provided for in these other agreements. How many jobs would that have meant on the

North Western? A. Well, we were operating approximately 180 jobs with one brakeman or one helper, so that would have meant that we would have retained 36 jobs, 1 and 1, under that proposition, and I think as we proceed that is an important figure to keep in mind because it will enter into my testimony later.

[259] Q. Well, as of this meeting on April 22nd, when Mr. Maloney introduced the idea of suburban service, had the work load or safety of the crews in the Chicago terminal ever been discussed? A. Not at all. In fact, as I testified yesterday, Mr. Maloney had emphasized in our discussions in the spring and summer of the preceding year that we couldn't even discuss the Chicago terminal jobs, they had to be returned to 1 and 2, and of course here he was saying I will let you buy them back to a 1 and 1 status after we put them back 1 and 2 in return for a five-day week. So I was a little bit surprised.

Q. At this April 22nd meeting, was the subject of the carriers' proposal on main line service mentioned at all? A. Yes, it was. After Mr. Maloney mentioned the matter of suburban service, I asked him how would we settle in his opinion our proposal involving main line road service. He answered that there is a trend around the country to 1 and 2, and in all of those other understandings they have set aside in their handling the carriers' proposal, and it will have to be set aside on the Chicago and North Western, and [260] he stated he was not willing to discuss or talk about it.

Q. When was your next meeting with the union? A. Well, at that point we decided to meet again on April 30, and we did meet on April 30.

Q. And who was present at that meeting? A. Your Honor, I have my conference notes here, if I may refresh my recollection as to who attended those meetings, it would be helpful.

THE COURT: You may do so.

BY MR. SCHMIEGE:

Q. Please do. A. On April 30th, the union was represented by Mr. Maloney, the General Chairman on the North Western district; again Mr. Callies, our Conductor General Chairman on the North Western District; and Mr. Burke, Mr. Buster Burke, Vice Chairman of the BRT, North Western District from Boone, Iowa.

The North Western was represented by myself, Mr. Beisel, our Director of Labor Relations operating, and Mr. Humphrey, our Assistant Manager of Labor Relations operating.

Q. At this meeting on April 30th, had Mr. Maloney changed his position at all? [261] A. No, he did not. Of course, in between the previous meeting and this April 30th meeting, we had given considerable thought to this matter of suburban service, and I started the meeting out by telling Mr. Maloney that I thought we should bring in the other general chairmen, that up to this point, you see, none of the other general chairmen of the other districts had even discussed the crew consist matter with us. I told him that I thought that we should bring them in.

At this point Mr. Maloney became a little bit upset, and said I will be very candid with you, the Grand Lodge decided that the Illinois Central and the North Western would be last. It was also decided that the Illinois Central would be before the North Western. Now the Illinois Central has concluded its negotiations, and he said the Grand Lodge is pressing me to get moving, get going, and he said, we shouldn't have any difficulty here because we have got all of these other agreements to base what we do on.

At that point Maloney asked out of hand if I rejected his suburban service approach and I said, oh, no, I wasn't going to reject his approach, but [262] I thought we should bring the other general chairmen in.

At that point Mr. Maloney stated, I don't think we will have any difficulty handling the crew consist matter separately because of what is in this file, and he lifted up a file,

and I said what is in the file? He said it contains all the crew consist agreements made across the country, and these agreements have established a percentage pattern, and that pattern will have to be followed here. He said, you don't think I would agree to any lower percentage here on the North Western, do you?

At that point I said, well, Mr. Maloney, I think in conformity with what Mr. Luna, your president, has said before the District Court of Appeals and many other places, we ought to handle this matter on a local North Western basis based on conditions which confront the North Western, and I think that you had better get the other general chairmen in. He at that time agreed that he would get in touch with the other general chairmen, and hopefully they would be present for our next meeting.

Q. Did you schedule a date for another meeting at that time? [263] A. Yes, a meeting was set for May 9th.

Q. And that meeting in fact occurred? A. Yes, it did.

Q. Now who was present? A. At that meeting on May 9th the organization was represented by Mr. Maloney, Chairman of the North Western District Proper; Mr. Cardinal, General Chairman of the former Omaha District, Mr. Stanley, General Chairman of the former M&StL Road District; Mr. Rosenthal, General Chairman of the former Litchfield and Madison District. Only one of our general chairmen was missing, Mr. Stahley, General Chairman of the former C&TW District, who was ill at that time—at least, I was told that, and I assume that he was.

[264] Q. What happened at that meeting? A. At that meeting? A. At that meeting, since this was the first time that the other general chairmen had been in to discuss crew consist with us, I confirmed with them what had happened theretofore insofar as dates were concerned, and they confirmed those dates with me.

After I confirmed the dates, Mr. Maloney then made a statement to the other general chairmen more or less in explanation to them of why the matter had been delayed up to this point. He described our informal meetings, his

and mine, in the spring and summer of 1968 by saying that the Grand Lodge had decided the Illinois Central and North Western should not be struck at the same time. He stated that he saw Mr. Luna just two days before, and Mr. Luna in his words was chafing at the bit for them to get going on the North Western.

At that point, I stated that I thought it would be appropriate at this time to go into a description and evaluation and analysis of the jobs on these other districts. Mr. Maloney said job studies would not be necessary, there is plenty of precedent for a North Western agreement in settlements [265] made on the other roads.

At this time I then proceeded to make a brief summary to the chairmen of the conferences that Mr. Maloney and I had the preceding spring and summer. I stated to them that they were informal conferences, hopefully in a good faith effort to sit down and settle the matter on the North Western. However, nothing was accomplished because at the end, Mr. Tuffley and Mr. Maloney insisted that we follow what had been done on the other roads.

At that point I was interrupted by Mr. Cardinal, the General Chairman of the former Omaha District, who stated there was no sense in sparring around, agreements have been made by the other railroads, he would not agree to anything different, and the Chicago & North Western must do exactly what the Milwaukee and the Great Northern had done as well as the others.

I then suggested to Mr. Maloney that he might inform his chairmen about the suburban service approach that he had made at our prior meeting. Mr. Maloney then told the chairmen that this was a matter that involved only he and Mr. Callies, and that he and Mr. Callies, the Conductor General Chairman, [266] would have to take care of it.

At that point, I interrupted Mr. Maloney and said, well, you raised the suburban service question. Apparently you want me to buy jobs back after I restore people we don't need. What would you have in mind to trade for them?

He stated, in a somewhat agitated manner, that he withdrew his suburban service proposal, forget about that approach, and it was withdrawn from the crew consist issue.

At that time I again repeated to the general chairmen that I thought we ought to engage in job analysis and job studies on all of the districts because we hadn't done that, and that was the manner in which this case should be settled. Mr. Cardinal said that he and Mr. Stahley, who was ill, would be in about the 14th or 15th to discuss the matter again with me.

[267] Q. As of that meeting had there been any discussions on the North Western concerning road jobs? A. None whatever.

Q. What position did the union take regarding road jobs then? A. Well, on main line road jobs, as I said before, Mr. Maloney took the position that we would not even discuss it because it had been set aside on other handlings. Insofar as branch line road jobs that had been blanked under the Award and had been operated with one brakeman and one helper during the preceding three to four years–

Q. Pardon me, Mr. Wolfe, I think you misspoke. You meant one conductor. A. What did I say?

Q. You said one brakeman and one helper. A. One brakeman. Yes, we are in road service now. I am sorry. In road service it is a conductor and a brakeman and in yard service it is a foreman and a helper.

In the preceding three to four years we had been operating a number of branch line road jobs with a conductor and one brakeman.

[268] At the May 9th meeting Mr. Maloney said he would not agree to study any of the road jobs that had been blanked; they too must all be restored without comment.

Q. The meeting you just referred to is the May 9th meeting? A. That is right.

Q. Were there any further meetings prior to mediation? A. Yes. Before Mr. Cardinal, the Omaha General Chairman left, on May 9th, he agreed to meet with me to dis-

cuss the crew consist issue on his district. We met on the morning of May 15th.

Q. At that time what was Mr. Cardinal's position on this dispute? A. After I identified the jobs in Mr. Cardinal's district that were working with a short crew–

Q. What do you mean by "identifying jobs"? A. Simply telling him which ones they were that we were working with 1 and 1.

Mr. Cardinal stated, and I remember very well, he said that positively all jobs must be restored to 1 and 2. He said Elmer Dirks, who for the purpose of the record, is the UTU [269] General Chairman on the Milwaukee Railroad, has got all of his jobs back, the Great Northern has put them all back, and I positively must have them back.

I asked Mr. Cardinal at that point if he was saying that we had to put all of the jobs back 1 and 2 simply because the other railroads had done so. He answered by saying "No, I am not saying that." And then he paused for about three or four seconds and said, "Yes, I guess I am saying that." Whereupon I asked him if we would be wasting our time if we discussed each of these jobs and analyzed them. He answered, "I am going to be honest, the answer is yes, we would be wasting our time." The discussion continued on a couple of general subjects which didn't really involve the crew consist issue, and we concluded by–I again asked Mr. Cardinal if we could have another meeting; I thought we should assemble overtime data; I thought we should assemble cars handled data, and Mr. Cardinal replied, "No, the jobs must be restored 1 and 2."

[270] Q. As of that time had you had the opportunity to meet with anyone from the Chicago Great Western district to discuss crew consist? A. No, we had not.

As I said before, the Great Western merged into the North Western July 1, 1968. We had our first meeting on May 15 in the afternoon. We met with Mr. Cardinal in the morning, and we met with Mr. Stahley, the former Chicago Great Western District General Chairman, that afternoon.

Q. What position did Mr. Stahley take in this dispute? A. Well, first we again confirmed with Mr. Stahley the dates on which the notices had been served and the dates on which the crew consist agreement under Award 282 had been executed. After confirming those dates we attempted to identify his 1 and 1 jobs. At that point I asked Mr. Stahley if he wanted to discuss them individually in detail. Mr. Stahley said he would have to go along with the other general chairmen because of the common terminal problems, and because of what had been done. I asked Mr. Stahley if he was willing to analyze the performance of each job assignment by [271] assignment, and his answer was, "They all must be returned at 1 and 1 at the common terminals." He would be willing to give us a few jobs perhaps at some outlying points.

Now the common terminals, of course, on the Great Western are the Twin Cities, Kansas City, Marshalltown, Des Moines, Council Bluffs, and a great majority of the yard jobs, of course, that we were operating 1 and 1 on the Great Western District were at—are at those common terminals.

Q. Why did Mr. Stahley make this particular reference to common terminals? What is the importance of that? A. Well, because at the common terminals, of course, these crews operate in proximity with the crews of other railroads and with crews of other North Western districts.

That was about the extent of the meeting with Mr. Stahley. We did discuss a number of other subjects. But insofar as the thrust towards handling the crew consist issue at that time, that was about the gist of it.

Q. Would you tell the Court, please, when mediation began in this case? [272] A. Well, when we finished—in fact, during the May 15th—that day that we met both Mr. Cardinal and Mr. Stahley for the first time, we received a wire from the National Mediation Board announcing that a mediator was coming on the property. I think they first said he would be there in the latter part of May but because of prior commitments and the Decoration Day holiday he actually appeared on the scene on June 2nd, 1969.

Now the mediator that was assigned was Mr. Glover, a veteran mediator with the National Mediation Board, who at one time was president of the Switchmen's Union of North America, but he has been with the National Mediation Board for many years.

Q. Did you have occasion to meet with Mr. Glover then?
A. Yes, the first day Mr. Glover was on the property he met with me privately, and I am sure that he also met with the organizations which is the customary way of handling something like that. They meet with you first to find out just exactly where you are and what has happened before they plan what they are going to do.

[273] Mr. Glover met with me on the 2nd. I briefed him on the dispute. That briefing consisted in summary of this: I simply told him—I advised him of the Atlantic Coastline litigation, the fact that the organization argued to the Court and testified to the Court that this was a matter that should be handled locally and should not be handled nationally; it had to be handled on each individual railroad because of the curves and the hills and the climate and the differences; it is the characteristics on each railroad being different. And yet on the North Western they had done just the opposite. They had refused to discuss the curves, the hills, the climate and the terrain and they had insisted immovably that we make an agreement restoring all of these jobs to 1 and 2 without discussing the North Western situation simply because the other railroads had restored jobs to 1 and 2.

THE COURT: Now we are coming to the point where the irresistable force is striking an immovable object.

THE WITNESS: Yes, Judge.

May I proceed?

THE COURT: Go ahead.

[274] BY THE WITNESS:

A. (Continuing) I told Mr. Glover that in my opinion at this point it was absolutely essential that we do some local—try to get these people discussing things from the context of the North Western Railroad. I suggested that

we, the North Western, go ahead and do a job study of the performance of work by some of these individual jobs, 1 and 1 jobs, that we had worked four years 1 and 1 most successfully in order to try and move them, to get them to do what their president had testified should be done, and on his testimony in part, I suppose, the Court ruled that this thing should be handled locally.

Mr. Glover took my request under advisement and said he would meet me for lunch the next day. We met for lunch, at which time he asked me how long I had in mind for such a job study, and I said, "Well, I thought we should study every job." He said, That would not be possible, the organizations would not stand for it.

THE COURT: What is the date now?

THE WITNESS: That was June 3, 1969, your Honor. [275] * * * I suggested then that we possibly—that we try very hard to study 50 of the 180 jobs in a two week period and that we recess the conferences for us, in order for us to accomplish that study. He said, "Well, I will be in touch with you." He called me back later that afternoon, as I recall and said that he would like to bring the parties together the next day. And I said, "Fine." And we met in our conference room for the first mediation session on June 4, 1969.

Q. Who was present at that session? A. At that session the organization was represented by a Grand Lodge officer for the first time since Mr. Tuffley was with us that one day in August of 1968. This is customary. When you get into mediation normally the organization will assign a Grand Lodge officer to work with their general chairmen. The Grand Lodge officer assigned was Mr. Moore, I believe, Deputy President of the BRT, and he was accompanied by Mr. Maloney, General Chairman of the North Western District, Mr. Stanley [276] of the M&St.L, Mr. Stahley, Chicago Great Western and Mr. Cardinal of the Omaha. Again, I had Messrs. Beisel and Humphrey with me.

Q. Would you explain what position the North Western took on the matter of job studies at that session? A. The

meeting opened by Mr. Glover asking me to discuss and explain why I thought a two-week job study might be of assistance. I answered that it was an attempt by us to show the organization representatives in concrete practical form why they should quit insisting upon a 1 and 2 restoration based upon what had been done on other railroads. At that point Mr. Maloney, after a little general discussion, stated that he, in his opinion job studies would not help to reach an agreement. Mr. Moore added that we would be in the same position after the study as we are now, namely, they would still be insisting on 1 and 2 just as the other railroads had done.

At that point I asked them to tell me why in their terms, give me a concrete answer as to why we had to restore the jobs to 1 and 2. Mr. Maloney [277] answered, "All you have to do is look at the other railroads. One railroad had 600 jobs 1 and 1 and they are all back at 1 and 2. Another railroad had 450 jobs at 1 and 1 and all but eight are back at 1 and 2." He said, "No matter how many time and motion studies you make, no matter how much you study the jobs, the fact remains that there is a national pattern established on the other railroads putting these jobs back at over 90 per cent." I said, "We are not talking about the other railroads; we are talking about the North Western."

I then asked Mr. Maloney if these other railroads had returned the men because they needed them. And at that point Mr. Moore interrupted and said that Mr. Maloney did not have to answer that question, and he did not.

[278] Q. What action did Mediator Glover take regarding your request for a two-week recess? A. Well, this was during the morning of June 4. As we were getting close to the noon recess, I recall that Mr. Maloney stated that he was of the firm belief that time studies or no time studies the BRT would get an agreement like it wants, 1 and 2, by saying here is what the Milwaukee, the Q, the Great Northern and the others have done, and this is what the North Western is going to do.

At that point Mr. Moore—or around that point Mr. Moore made a suggestion that we recess for lunch, and we did.

When we came back after the luncheon recess Mr. Glover shortly thereafter stated that the conferences would be recessed until June 18th so that the carrier could make a two-week 50-job study. At that point as we were leaving, Mr. Moore, I recall very well, made another concluding statement saying that he presumed the study was for the benefit of the carrier and not in any way to be used by the organization since when we returned on the 18th he did not intend to change [279] his position one iota relative to insisting on 1 and 2. In other words, regardless of what our studies showed, his position would remain the same, 1 and 2. I told him that that was very interesting, at which point the meeting was adjourned.

Q. Were those job studies in fact made? A. Yes, sir, they were between June 18th and the 1st—I mean, between June 4th and June 18th the job studies were done. They were performed by us.

I might add that at the June 4th meeting at the time Mr. Glover announced he was going to give us a recess he indicated to me that I should the next day advise the union what jobs we were going to study so they could have representatives there if they wanted to and that when the studies were concluded we should give them the results. And that is the time when Mr. Moore made this statement about whatever the studies returned he would still come back on the 18th demanding 1 and 2.

* * * * *

[280] Q. Mr. Wolfe, could you tell the Court, please, what the results of those job studies were? A. Yes. We made the studies during a two-week period by supervisory officers actually riding with and observing the performance of work by 50—I think we really were only able to get 45. We intended to get 50 but because of time pressures we were only able to get 45. But they observed minute to minute performance by these crews. The studies on the whole confirmed our position that the crews were not over-

worked and were able to accomplish their jobs during their tours of duty without any trouble and with efficiency.

Now on the 18th when we met, on a Wednesday–

* * * * *

June 18th, again, the people there; we were represented by myself and Mr. Beisel [281] and Mr. Humphrey, and the organization was represented by Mr. Moore, Mr. Maloney, Mr. Cardinal and another general chairman who–this was the first time he had come in–Mr. Shannon, the M&StL district yardmen general chairman. Mr. Glover also had another mediator with him, an assistant mediator by the name of Willets. So the Mediation Board had two representatives.

When we started out that day Mr. Maloney went right back to the worth of our job study. He said, "I don't care what the study shows. We aren't going to change our opinion." But, he said, "I will say one thing, at least my reports indicated that you conducted the study honestly."

* * * * *

[282] Maloney then asked me if I believed railroads across the country used either the guidelines of 282 or job or work studies in agreeing to 1 and 1 crews. I said I really didn't know, but I did know that we were supposed to handle this matter locally and find out what was going on on the North Western. And again he said that regardless of what those studies showed, it had to be 1 and 2.

At that point Mr. Moore asked me if I would be agreeable to accepting the pattern. I remember very well I asked him what the pattern was. Mr. Moore said, "The pattern is return 98 per cent return to 1 and 2 crews." Mr. Maloney at that point, I remember, jumped up and he said, "On that note it is time to make an agreement." And handed out to the parties the organizations' first written proposal. We looked at the proposal and discussed it for a short time, after which I again brought up the necessity of analyzing and examining the jobs. Mr. Moore stated that

he didn't give a damn about our time and motion studies, [283] the jobs must be returned to 1 and 2.

* * * * *

[284] Q. Mr. Wolfe, I now show you what has been marked for identification as Plaintiff's Exhibit 16. Would you describe that document, please. A. Yes. This is a copy of the proposal that Mr. Maloney handed to us at the meeting of June 18th.

* * * * *

Q. Mr. Wolfe, did the union submit any other [285] proposals during mediation? A. Yes. Subsequent to that proposal and during some of the following meetings which lasted until July 2, your Honor, the union handed us two additional proposals, a total of three during the mediation sessions.

Q. I now show you what has been marked for identification as Plaintiff's Exhibit 17. Would you identify that document, please. A. Yes. This is an employee proposal, and it is the second proposal that they handed to us during the mediation period. If my memory serves me correctly, I believe this proposal was handed to us, or was given to me by the mediator on June 24th, and we discussed it on June 25th.

Q. This is Plaintiff's Exhibit No. 18 for identification. Would you identify that, please. A. This is the third employees' proposal.

MR. SCHMIEGE: Plaintiff's Exhibits 17 and 18 for identification are offered in evidence, your Honor.

THE COURT: They are admitted.

* * * * *

[286] Q. Mr. Wolfe, will you explain to the Court, please, in a summary fashion what those proposals had to do with? A. May I have them?

The first proposal which was handed to us by Mr. Maloney right after Mr. Moore's description of the national pattern as a 98 per cent return is in fact a proposal that would make all jobs in both road and yard service 1 and 2,

that is, staffed with two brakemen or two helpers. It would also restore a third brakeman on certain way freight jobs on our main lines.

On the North Western, your Honor, prior to Award 282, we have a rule in our agreement, Rule 49, which required us to use a third brakeman on certain local freight jobs, you know, that stopped along the way at towns and hit a lot of head end business, less than carload business, that sort of thing. This rule was, in fact, removed, eliminated by one of the awards under 282, which permitted us to do away with that rule and operate those main line way freights with two brakemen.

Now, in conformity with the union's position [287] that they had to wipe out 282, they also in this proposal wanted us to put back that Rule 49, put those third men back, so this was about 120 per cent, or something like that. But in any event, it was simply a carte blanche return to 1 and 2.

* * * * *

The second proposal was handed to me by a mediator, I believe, on June 24th, and the third proposal, I believe, was handed to me by the mediator on July 1st. * * *

* * * * *

The second proposal * * * [288] would have returned all jobs to 1 and 2, and would have added a brakeman on three jobs which we operated with only a conductor prior to the Award. It would also have returned the third brakeman to all of the way freight jobs, and it would have permitted us to continue to operate five of our 180, 1 and 1 jobs, with the single brakeman, five yard jobs.

[289] * * * * *

MR. HALEY: In other words, it was a concession to leave one on those?

THE WITNESS: On five of 180 jobs.

BY MR. SCHMIEGE:

Q. Five of 180 that are presently 1 and 1? A. Yes. We have authority to operate about 216, your Honor, and

we were only operating 180 of those because we had some protected men. You remember under the award we had to protect all of the people–

THE COURT: Those that were employed.

THE WITNESS: Right, your Honor. We had about 26, 36 jobs that we had to have [290] second men on to give them work.

THE COURT: And your position was that you had an offer of five?

THE WITNESS: Really five out of 216, yes.

Now the third proposal and the last proposal we received in mediation was almost identical with the second one. The only distinction, the only difference, meaningful difference, was that it added three branch line road jobs to the five yard jobs.

THE COURT: Eight?

THE WITNESS: Eight, yes, your Honor. Of the 216, this would have permitted us to operate eight with 1 and 1, or we would have had to restore the second man to 208 of the jobs that we were authorized to operate.

Q. During mediation, did the carrier have occasion to introduce any proposals?

* * * * *

[291] A. So far up to now, the only proposal that had been introduced was the one employee proposal on June 18, and when that meeting ended, the Mediator said to us, I want you to have a proposal at the next meeting. So on Friday, June 20th, we introduced our first proposal.

That meeting on June 20th was attended only by Mr. Moore. He was the only employee representative there. The other general chairmen, I [292] assume, or all of the general chairmen were involved in other matters.

The Mediation Board was represented by Mr. Glover and Mr. Willets. At that meeting I handed Mr. Moore our proposal and described it to him.

Q. Let me show you now what has been marked for identification as Plaintiff's Exhibit 19. Would you describe

that document, please. A. This is the first carrier proposal, handed to the parties, handed to the other side on June 20, 1969.

* * * * *

[294] THE WITNESS: There are six proposals, your Honor. Are they marked?

MR. SCHMIEGE: Yes. Your Honor, we have the six proposals. The first one is Plaintiff's Exhibit 19 for identification, which is our first proposal.

* * * * *

The second proposal is Exhibit for identification No. 20; the third for identification No. 21; No. 4 is Plaintiff's for identification No. 22; No. 5 [295] is Plaintiff's for identification 23; and No. 6 is Plaintiff's for identification No. 24.

Those are all offered in evidence, your Honor.

THE COURT: They are admitted.

* * * * *

[296] Q. Mr. Wolfe, would you at this time briefly summarize those six proposals and explain to the Court the different approaches that were taken in each of those proposals. A. Yes. These are the six carrier proposals, Judge.

The first one was based on the needs of the North Western as mirrored by the guidelines of Arbitration Board No. 282, the actual experience that the North Western had for four years in running 180 some odd jobs with one brakeman or helper, and the conditions characteristic of our railroad. It was strictly a proposal based on our needs and submitted to the organization as such.

This proposal would eliminate the second brakeman on many main line through freight jobs, on additional branch line and yard jobs, and would add a second brakeman to a few of the jobs that we were presently operating 1 and 1 because of changed conditions.

Carrier proposal No. 2 was strictly a compromise proposal. The second proposal was a compromise proposal.

What we did in this proposal [297] was eliminate the jobs, eliminate the second man in main line through freight service.

THE COURT: May I see the first one? Just let me look at it for a second.

THE WITNESS: Yes, your Honor.

THE COURT: The total was how many?

THE WITNESS: The total jobs there that would be operated 1 and 1, it is a figure that you can't arrive at because the criteria in main line through freight service was the number of pick-ups and set-outs the trains would make. So it would be a varying figure.

THE COURT: Varying from what to what?

THE WITNESS: I would say that probably would have permitted us to operate around 400, 350 to 400 jobs with one brakeman or helper.

* * * * *

The second proposal, your Honor, as I said, was strictly a compromise. We eliminated from it all of the additional yard and branch line and main line through freight jobs that were not subject to treatment under Award No. 282. This proposal would have pretty much left us right where we are now with changes [298] made for changed conditions.

For example, your Honor, I am going to get into this with our next proposal, on our railroad, for example, the Award was entered in 1964, and we have been applying it every since then. But since 1964, Chrysler built a big plant at Belvidere, Illinois on the North Western, and we serve that plant. When we considered, when the Referee considered the jobs in 1964, we only had one yard crew there. Now we have four around the clock, and we think that all of those crews should only have one helper. However, because we haven't examined into the subject only the one has one helper, and the other two have two. But that is just an example. Things do change on the railroad, and crew consist is one subject where you must have a procedure to meet those changes.

All of our proposals, the first two that I have discussed, had such a procedure; namely, a provision for local arbitration to look into and decide these matters if the parties couldn't agree on jobs where we had changed conditions.

The organization objected to that procedure in our discussions. They said that they would not [299] agree to any arbitration provision. So the carriers' proposal No. 3 is exactly like proposal 2 except we eliminated the local arbitration feature, and it contains no provision to take care of future changed conditions.

Carrier Proposal No. 4 was a completely new approach. As I go through these, your Honor, each one of them as we presented it was summarily rejected by the organization, so as we went from one to the other, it became necessary for us, we thought, to try to find new approaches to the subject in an attempt to settle the dispute.

Now Carrier Proposal No. 4 is based on submitting the whole crew consist issue to third party determination with the details to be worked out with Mediator Glover.

THE COURT: By arbitration?

THE WITNESS: Yes, your Honor. That was rejected.

Carrier Proposal No. 5 was another new approach. As the proposal says, adding an extra man to any assignments presently worked would reduce our productivity since our studies show that the second man was unnecessary by every [300] test. However, since it seemed to be absolutely essential to the organizations that we put the men back we said let's examine into the possibility of putting them back, but let's change some of our other rules so that we get paid for that decrease in productivity by putting the second man back. We said we are open to suggestions as to what rules we would change, but there were plenty we could, such as the interdivisional run. That approach was summarily rejected by the organization.

You see, Judge, our present rules generally limit us to runs of a hundred miles based on seniority districts. We can run crews on some trains much farther than that. We could if we had rule changes which would help us. We

would like to do that in many cases, and we thought, all right, we will put back some second men we don't need if you will help us increase our productivity by changing this other rule.

That was simply an example of what I had in mind. It was an approach, and the proposal was simply a written exposition of that approach, but that approach was rejected.

[301] Carrier Proposal No. 6 was our final attempt, and this too was a different approach. Here we agreed that in return for a one-year moratorium on crew consist changes we would grant the employees a five-day week in suburban service. In other words, in return for maintaining the status quo just as it was the day I made the proposal, we would give them the five-day week in suburban service. That was summarily rejected.

[302] Q. Mr. Wolfe, before we resume your testimony as to what happened in mediation, let me get it straight in my own mind exactly where we stand.

On June 18th of this year, the union presented its first proposal, and we have discussed that one in detail already. At that meeting Mediator Glover asked you to present a proposal, and you presented your first proposal at the meeting of June 20th of this year? A. That is right. That was a Friday.

Q. And you have just analyzed that proposal? A. I really didn't analyze it. I described it to Mr. Moore, who was not accompanied by any other general chairmen. He was by himself. Mr. Moore rejected the proposal out of hand. He said he would not accept it, and at that point the Mediator said conferences would be resumed next week, and he announced that he would not be with us the following week, most of that week, that is Mediator Glover, and that Mediator Willets would handle the conferences. He did not set a date for the next meeting. He simply said that Mediator Willets would be in touch with us the following week.

Q. Did Mediator Willets get in touch with you? [303] A. Yes, he did. He called me and came over, and we had

private discussions between just Mediator Willets and myself on the 23rd and the 24th, which was Monday and Tuesday. On the 24th, I believe, he handed me BRT proposal 2.

Q. When was the next mediation session? A. The next mediation session was June 24th on Wednesday of that same week.

Q. What happened at that meeting? A. Mr. Moore was not present at that meeting. At that meeting the general chairmen were there, and Mr. Maloney, Mr. Cardinal, Mr. Stahley, and Mr. Shannon.

Mediator Glover was absent. Mediator Willets was there.

We were represented by myself, Mr. Beisel and Mr. Humphrey.

Q. What happened at that meeting? A. At that meeting—this was the first time, of course, that the organization general chairmen had had a chance to discuss our proposal with me, since they were not there at the Friday meeting.

THE COURT: Your proposal No. 1? Your first proposal?

[304] THE WITNESS: Yes. Right, your Honor.

I explained it to the general chairmen, and Mr. Maloney, who did most of the talking, said again that the organization was not going to discuss main line jobs or agree to any changes in main line jobs, and of course reducing many main line jobs to one brakeman was an essential part of our first proposal, and he simply repeated what he had been telling me for a year, that they weren't going to discuss our proposal.

At that meeting, I also discussed their proposal No. 1, which was simply a return to 1 and 2, and repeated that I thought that an agreement here had to be based on North Western conditions. This proposal was not; it was simply a written confirmation of what they had been telling me all along, that everything had to be returned to 1 and 2 because that is what the other railroads had done.

I think that is about all that was said of any real substance at that meeting on June 25th.

Q. Did mediation resume the next day? A. Yes. The next day mediation did resume, [305] and I did not attend the entire meeting. I was there for some of it. Mr. Beisel and Mr. Humphrey of my office conducted most of it because the meeting was dedicated simply to explaining our job study results. We had promised the Mediator that we would give to the Union the results of our job studies.

At this meeting we had the summary sheets, and my staff members handed those summary sheets out and explained them to the organization representatives.

Q. And did the organization make any comment on the results of those studies? A. Well, when I was there they discussed the detail of the study, in other words, how it was done, and they again repeated that they did not consider it meaningful in making an agreement. I might add that Head Mediator Glover was still absent. This was being handled by his junior assistant up to this point, that week.

Q. The parties had an opportunity, though, didn't they, to meet with Mr. Glover on June 27th? A. Yes. On June 27th, Friday, Mr. Glover returned, and the first thing he did was ask for [306] a progress report as to what had happened. I made a report to him in effect that there had been no progress. The organizations were still insisting upon a 1 and 2 standard. I said they were even insisting upon the return of a brakeman to some of our pre-award 282 conductor and foreman only jobs. I said they were also insisting upon a return of certain third brakemen on main line way freight.

This was a relatively short meeting. Mr. Glover ended it by simply saying that we should come up, the carrier, with another proposal, and I agreed that I would. At this point each side had handed the Mediator one proposal.

Q. How many remaining mediation sessions were there? A. There were only, let's see, two sessions remaining.

Q. And those were the sessions on June— A. Monday, June 30th.

Q. And July 2nd? A. And July 2nd, but I did meet with the Mediator privately on Tuesday, July 1st.

[307] Q. What happened at the June 30th meeting? A. At the June 30th meeting I handed out Carrier Proposal No. 2 and I explained the difference between Carrier Proposal No. 1 and Carrier Proposal No. 2.

After I finished my explanation, Deputy President Moore again went back to the matter of other railroad settlements, stating that the North Western had to do the same as the others. He said a pattern is established, the North Western must do the same.

I replied by saying, well, these jobs are unneeded. What do we get in return? And there was no reply. Again I asked him, do you have any other ideas? And Mr. Maloney said it must be 1 and 2. The settlements on other railroads must be equaled by the North Western, the same as the Milwaukee, the same as the other western roads.

I again pointed to our study results, what they showed insofar as productivity was concerned, what efficiency, et cetera. They again repeated they didn't care about our studies.

I again suggested the possibility of looking into other rules, and I received a negative answer. I at that meeting, for the first time since [308] our March proposal, said, would you now be interested in additional money for the men, in sharing the productivity gains, and I promptly received a negative answer.

At that time Mr. Glover said, gentlemen, I am going to conclude the meeting, and I want the employees to bring in another proposal.

* * * * *

Q. At this June 30th meeting when the matter of additional compensation was discussed, was there any reference to certain statements that Mr. Luna had made in the L&N case? A. Yes. I believe I mentioned that Mr. Luna had made a statement in the L&N case to the effect that the BRT or UTU constitution prohibited money or offers of this type or discussion of them.

Q. The next mediation session, joint mediation session you had, was on July 2, is that correct? A. That is correct.

Q. What happened at that meeting? [309] A. At the July 2nd meeting, we discussed BRT proposal 3, and our proposals 3, 4, 5 and 6, which I have previously described.

BRT proposal No. 3 was the one which would have caused us to return 208 jobs to a 1 and 2 status of the 216. It was no meaningful departure from what they had offered me up to that point throughout our handling of this matter, and I told them that it was not a recognition in any way, shape or form of what this situation was at North Western, and rejected it.

They summarily rejected our proposals 3, 4, 5 and 6. 3 was the job proposal without the local arbitration provision; 4 was the overall arbitration proposal; 5 was the rules productivity proposal; and 6 was the suburban service proposal.

After the organizations rejected all six of our proposals, Mr. Glover asked if anyone else had anything else to offer. I replied that we had exhausted the approaches to this thing, we had offered every approach we could think of, and we had no more proposals, and the organization said they had none, at which time we ended the meeting.

Q. At that meeting did Mr. Glover hand you [310] a letter that he had received from the Trainmen representatives? A. Yes, he did.

Q. I now show you what has been marked for identification as Plaintiff's Exhibit 25. Would you identify that document, please. A. Yes. This is a letter addressed to Mediator Glover and signed by all five of our district general chairmen and Mr. Moore, Deputy President of the UTU, with a copy to Mr. Luna, Mr. Tracy, the Executive Secretary of the National Railway Adjustment Board, and to me.

It rejects our proposals and it speaks for itself.

MR. SCHMIEGE: Plaintiff's Exhibit No. 25 for identification is offered in evidence, your Honor.

THE COURT: It is admitted.

* * * * *

Q. Mr. Wolfe, when did the National Mediation Board proffer arbitration in this case? [311] A. The Mediation

Board proffered arbitration in this case on October 8, 1969.

Q. How was that proffer received by the parties? A. On October 10th, as I recall we received that proffer later on October 8—I am sorry. I will strike that.

The letter was dated October 8, your Honor. I think we received it on October 10th, and we answered on October 10th, the same day, unqualifiedly accepting mediation, and suggesting that the parties immediately meet to arrive at an agreement setting the procedure for the arbitration.

THE COURT: You meant you accepted arbitration, that is, you indicated that you would accept arbitration?

THE WITNESS: Yes, Judge.

* * * * *

[312] Q. Mr. Wolfe, when we recessed you had just testified that the North Western accepted the Mediation Board's proffer of arbitration. How did the union receive that proffer? A. The union rejected the proffer of arbitration.

Q. What action did the Mediation Board take then? A. The National Mediation Board terminated its file, that is, closed its services in the case by letter on October 16th, 1969.

Q. After the Board terminated its services, did you have occasion to resume negotiations with the union? A. Yes. On November 10th, 1969, Mr. Tuffley, the BRT vice president who met with me on August 6th, 1968, that one day, but who does handle other matters on our railroad, and I discussed resuming negotiations. We agreed to resume on November 12th, which was a Wednesday.

THE WITNESS: Now this is not uncommon, your Honor, in this industry. Under the Railway [313] Labor Act, the final 30 days cooling off period started to run when the Board closed its file.

THE COURT: I have had a good deal of experience with that, fellows coming in at midnight. I am familiar with it, but it does go on from time to time and then all of a sudden it stops.

THE WITNESS: Well, the stopping date here was the 16th, as you know. So, it is not uncommon that the parties will try to get together during that last 30 days, and that is what happened here.

THE COURT: They don't stop and start shooting at each other.

THE WITNESS: No, we don't. We certainly don't.

BY THE WITNESS:

A. (Continuing) In this telephone conversation we agreed to meet on the 12th. However, before we agreed to do that I told Mr. Tuffley I did not care to bargain under a strike threat to negotiate under a strike threat. And he said as long as we were meeting, the organization would not use self-help. However, to me that meant that once we broke off negotiations we did have a strike threat.

[314] We met from the 12th to the 16th—I mean—I am sorry. We met from the 12th through the 16th, that is right. Yes. Wednesday to Wednesday. That was a lost seven days. We basically did three things during that time. We spent two days identifying the jobs, again. This was Mr. Tuffley's first real exposure to the case, and we spent two days identifying the jobs. We spent another several days arguing over peripheral agreement language before we even approached the question of the number of jobs that would be operated 1 and 1 or 1 and 2.

We spent the remainder of the time in the same kind of discussion Mr. Maloney and I had had in August of '68, only this time it involved all of the jobs in all of the North Western districts. The end result of that was a union position that we could continue to operate 36 out of 216 jobs 1 and 1. Now that, as I said, was extremely consistent with Mr. Maloney's statement the first day we began negotiations that 80 per cent of the jobs must be returned 1 and 2. Now that was 36 and we ended up with 32.

Q. One last question, Mr. Wolfe, and that is [315] during the conferences that you participated in, that is, the conferences in 1968 and '69 during mediation and so forth, did the union representatives ever raise the argument that

from 1966 on their full-fledged bargaining had been interfered with because of the fact that during 1965, after the union had served its notices, the carriers had stated that those notices were premature? A. No, sir, they did not.

* * * * *

[316] CROSS EXAMINATION

BY MR. HALEY:

Q. Mr. Wolfe, to start backwards a little, you met with Mr. Tuffley after the Mediation Board had relinquished its jurisdiction and met with him on November 12th, 13th, 14th, 15th, and I think the 16th and 17th up through the 19th, didn't you, nearly every day including Saturdays and Sundays? A. It was one week including Saturday and Sunday meetings. It was from Wednesday to Wednesday, Mr. Haley.

Q. Your discussions with Mr. Tuffley were not nearly so cursory as your testimony a few moments ago would indicate, were they? Didn't you go over jobs by jobs, a list of jobs that were prepared that indicate one to the other whether you would agree that this one could be operated or would agree to operate it with two brakemen or two switchmen, or this one with one brakeman or one switchman? A. As I testified, Mr. Haley, we identified the jobs–

Q. Now when you say "identified," let's get the significance of the word "identify."

THE COURT: Let me ask this: How long [317] did the conference last?

THE WITNESS: Each conference, Judge?

THE COURT: This particular conference.

THE WITNESS: It lasted from Wednesday, November 12, we began at 1:30 in the afternoon–

BY MR. HALEY:

Q. And quit at 5:00 according to my notes. A. That is approximately right.

THE WITNESS: And we met Thursday in the morning and in the afternoon. We had met on Friday. We met on Saturday–

BY MR. HALEY:

Q. From 10:00 to 5:00? A. From 10:00 to 5:00.

Q. On Friday, I have. A. Well, on Saturday we met–

Q. 10:00 in the morning? A. 10:00 we began, yes.

Q. You went through until dinnertime? A. We went through until dinnertime.

Sunday we had, I think, a briefer conference. We did break for lunch, but I think we quit about 3:00 or 4:00, as I recall.

Q. You started in again the following week? [318] A. We met Monday, and we met on Tuesday. We broke up on Wednesday.

Q. Wednesday was your last day? A. That is correct.

Q. So you put in practically nine full days–ten full days? A. Well, it was a week, Mr. Haley.

Q. A week. At about, say, some sixty-odd hours we are talking, or thereabouts? A. I haven't added the hours up.

Q. I am just getting a rough guess. A. Well, I would have to sit down and calculate it.

Q. Now what you had was you had a list of jobs that were currently on which under Board Awards or agreements made under the Award of Board 282, the railroad was authorized to work at less than the jobs had been required to be manned before the Award of Board 282? A. We compiled such a list.

Q. You had a copy and Mr. Tuffley had a copy? A. It took us two days, a better part of two days to compile the list. We handed it to the union, I think, the third day.

[319] Q. In other words, it was a list by description of the job? A. It was a very simple list. It simply identified each job by name.

Q. Right. A. That is, and let me give you an example; in yard service at Clinton, Iowa, for example, we would list the 0-1 job, and list the 0-2 job and the 0-3 job.

Q. Do you have a copy of that here with you? A. No, I do not.

Q. Let me see if Mr. Tuffley has it so I can see if it is significant.

(Brief pause.)

MR. HALEY: We will make extra copies of this, your Honor, if we may.

Mr. Reporter, will you mark this as Defendant's Exhibit No. 2 for identification, please.

* * * * *

[320] Q. Let me show you what the reporter has marked Defendant's Exhibit 2 and ask you if that is what you call the identification of the jobs from which you and Mr. Tuffley were working? A. That is one of them. This is road service.

Q. This is road service. A. We had two.

Q. You had two? A. That is the end product, however, Mr. Haley. That is what came of the two days or the better part of two days' discussion. In other words, this wasn't agreeing on which jobs would be worked 1 and 1. We hadn't even approached that subject. This was simply attempting to identify what jobs we had authority.

* * * * *

[321] Q. What we have marked as defendant's Exhibit 2, you say, is road jobs? A. Right.

Q. Now what is the other that I hand you now which hasn't been marked yet, is that yard jobs? A. It is yard jobs. If you will let me look at it just a minute.

Q. Sure. A. Yes, that looks like the final product.

MR. HALEY: Mr. Reporter, will you mark this as Defendant's Exhibit 3 for identification, please.

THE COURT: I take it that when you say that is the final product that you were sitting there and you had lists of papers and you went over working papers, so to speak, and this is the final product at the end of the day; is that what you mean?

[322] THE WITNESS: Yes, sir. This was an agreed upon list, your Honor, that these are the jobs that we had authority to work 1 and 1. In order to arrive at that list we took a listing of all of our yard jobs. We talked from it.

THE COURT: I see. You had the work papers there besides this and from those work papers, your listings, this is the list that you came up with?

THE WITNESS: If I may, your Honor–
MR. HALEY: Let me see if I can get it.

BY MR. HALEY:

Q. We have now marked two exhibits, Defendant's Exhibits 2 and 3. Under the Award of Board 282, the North Western and other railroads that it acquired or merged with later, had obtained authority to reduce certain crews from what theretofore had been required under agreements or by practice? A. Yes, sir.

Q. Where before the agreement of the practice required a conductor and two brakemen or a foreman and two helpers, you had acquired authority to reduce it, the crew, from a conductor and two brakemen to a conductor and one brakeman or in a [323] yard crew from a foreman and two helpers to a foreman and one helper? A. That is right.

Q. In some instances to a foreman alone or one man alone? A. Right.

Q. Then what you did then when you commenced to reconsider these notices these exhibits that have been marked Defendant's Exhibits 2 and 3, No. 2 is the list of road crews that you were authorized or had been authorized to work with a fewer number than before the Award of Board 282? A. That is correct.

Q. The exhibit that is marked Defendant's Exhibit 3 is the list of yard crews that you had been authorized under the Award of Board 282 to work with a lesser number than was required prior to that time? A. That is correct.

Q. These were the crews some of which you were working with a reduced number and some of which you were not? A. Right, sir.

Q. But you had under the Award of Board 282 [324] acquired the right to work these crews with less than the number theretofore required, and these were the crews that you were negotiating about? A. Yes, sir.

[325] Q. All right. So that when you say you were identifying the jobs you mean that you were listing the ones that you had been authorized to reduce under Award

of Board 282 and that the union was trying to get increased; is that right? A. Those were the jobs that we had authority to operate 1 and 1. They wanted 1 and 2, absolutely.

Q. There were some jobs that you did not get the authority to reduce under the Award of Board 282, weren't there? A. Yes, sir, there were a few.

Q. Well, the Award of Board 282 didn't authorize any reduction in main line crews? A. That is right.

* * * * *

[327] Q. You proceeded under 282 and you asked for authority to reduce two hundred and some odd crews, I believe you said? A. I believe the number was 200 and—this is by Award now. We did it two ways.

Q. Let's do Awards. A. Let's take Awards first.

I think we asked for authority to eliminate the second man on 224 jobs.

Q. How many did you get from that? A. 194.

Q. 194? A. Yes.

Q. You got a pretty good average, then? A. 88 per cent.

* * * * *

[328] Q. Well, what percentage did the railroads get? You have been dealing in percentages. A. You mean the average percent?

Q. Yes. A. I can give you the average percent, but of course an average distorts the variances.

Q. Well, we have been dealing in averages. What was the average? A. The average of the group, I suppose, was over 80 per cent.

Q. I believe your dad said yesterday 87 per cent, I think he said, A. If my dad said 87 per cent, I will accept that.

Q. That is right. I think he did.

Did the North Western fare as well as the average? A. As well as the average, yes.

* * * * *

[329] Q. So then, this is what—during this week after the Mediation Board terminated its services these two exhibits that I hold in my hand, Defendant's Exhibits 2 and 3,

were the crews that you and Mr. Tuffley were discussing; is that right? A. With one qualification, Mr. Haley. I asked Mr. Tuffley if he was willing to discuss main line road service, our proposal, and he didn't answer me when I first asked the question, but the next day he told me no he was not willing to discuss it. So after he gave me that answer–you are right, the answer to your question is those were the jobs we discussed.

[330] Q. In other words, notwithstanding–your first question was will you talk about main lines, which you hadn't been able to reduce under the Award of Board 282? A. That is right, in which your people refused to talk to us about.

Q. At that time? A. At any time.

Q. Well, anyway you turned from that to these two lists that I hold in my hand, is that right? A. Well, you say we turned to it–that was a product of our efforts. We, at least, had the jobs identified.

Q. You talked about them for this week, is that right? A. Oh, no, no. After we identified the jobs we set that aside. Mr. Tuffley had another procedure he wanted to try. It was along these lines–Mr. Tuffley said, "Once we identify the jobs before we discuss what jobs should be 1 and 1 and what jobs should be 1 and 2, why don't we try and agree on the framework of agreement, language, putting aside completely the numbers on jobs." I said, "Mr. Tuffley, up to this point I have been unable to get your people to move in any direction off 1 and 2 and what other railroads did. I will be perfectly pleased to try your procedure."

So, for the next two days we fiddled around with peripheral agreement language that had nothing to do with the real merits, the guts, if I may, of this dispute.

Q. Are you saying you never got down to considering whether you would agree to change– A. I didn't say that. I said we did not address ourselves to that subject when we finished identifying the list, and that was your question.

Q. All right. Did you at any time during this time you discussed these jobs that are listed here ever indicate to Mr.

Tuffley that the North Western would be willing to increase the number of helpers on any yard crew or the number of brakemen on any road crew? A. I certainly did.

Q. Did he indicate to you that he would be willing to leave some at 1 and 1 the way they were? A. Yes, as I testified, the final offer before the organization broke up our negotiations was 32 [331] jobs that they would permit us to operate 1 and 1 which was absolutely consistent with what they had said they were going to do the day we started negotiations in April of 1969.

Q. You indicated to Mr. Tuffley you would make some concessions from your position and he indicated he would make some from his, is that right? A. Mr. Haley, I had to in order to see how far they would go.

Q. Just answer that question, will you, please. Is your answer yes? A. Yes.

Q. Now, Mr. Wolfe, when you made these job studies that you keep talking about, what you did you sent out instructions to people to make a time and motion study of certain crews; is that right, how they spent their time? A. Work studies, or some people call them time and motion studies.

Q. Time and motion studies or work studies? A. [illegible] sir.

Q. Did you make them in the light of the guidelines of the Award of Board 282? A. A work study is simply made—is a study [333] of what the people actually did, performance of work in time frames, Mr. Haley, and that is exactly what it was.

Q. Whether they are standing still or whether they are moving or whether they are setting a brake or whether they are giving a signal or whether they are climbing a boxcar or whether they are riding a boxcar or what they are doing? A. That is right.

Q. You are not representing to this court that you and I or that a superintendent and a local chairman can observe the same crew from day after day and day after day and arrive at the same result as to whether that crew should

have two helpers or one helper? There is a basis for a difference of opinion, isn't there, even under the guidelines? A. There is a basis for a difference of opinion, I suppose, in almost anything.

[334] Q. In other words, you don't necessarily arrive at the same result if you are James R. Wolfe, Vice President of Personnel, or Maloney, General Chairman? A. Mr. Haley, four years of experience convinced us quite well that we needed only one man. This was simply trying to convince your side.

Q. That is your view. A. This is experience. We did it for four years.

Q. Well, that is your view.

Mr. Maloney and Mr. Tuffley and Mr. Moore hold a different view, don't they? A. They hold a view that all jobs had to be restored to 1 and 2 because that is what the other railroads had done.

Q. Well, those railroads that made agreements like that, they agreed to that, didn't they? A. They certainly did.

* * * * *

[335] Q. Now one of the guidelines—well, let me ask you first; the North Western operates in Kansas City, Missouri alongside the Kansas City Southern; isn't that right? A. That is right.

Q. You operate in Chicago alongside a lot of other railroads.

What railroads—in what places does the North Western operate where at the time you were having these discussions other railroads operated that had already settled their crew consist? A. If I understand you correctly, you are asking me at what locations do we operate where other railroads had settled their crew consist issue?

Q. Right. In other words, you keep saying some other agreements were being suggested to you or the union was arguing that you should make an agreement such as—I think you said, the Milwaukee. Had the Milwaukee settled a crew consist agreement? A. It certainly had.

[336] Q. Were you familiar with the provisions of the Milwaukee agreement? A. Reasonably familiar.

Q. Did you testify—I understood you to testify yesterday that part of your job was to keep with agreements that were made on other railroads. A. Yes, that is right. When I said "keep up" I charge collecting them and I look at them.

Q. Were you conscious when you were talking with the general chairmen and the vice-presidents of the UTU about this crew consist dispute as to the nature of the agreements that had been made on the Milwaukee? A. I certainly was. It conformed exactly with what Mr. Moore said, a national pattern.

* * * * *

Q. Were you familiar with the agreement that [337] had been made on the Burlington? A. Yes, sir.

Q. What about the Santa Fe, do you run alongside the Santa Fe? A. Do we run alongside the Santa Fe?

Q. Anyplace. A. I don't believe so.

THE COURT: You may have some parallel—generally speaking, parallel in the same direction but not close to each other?

THE WITNESS: That is right, your Honor. We run out through Glen Ellyn and Wheaton and that territory and the Santa Fe runs down through the southwestern part of Chicago.

Q. What do you have at Kansas City, between here and Kansas City? A. Between here and Kansas City?

Q. Yes. A. We have a line of railroad.

Q. And the Santa Fe had one between here and there? A. Yes, but they aren't very close together.

Q. They aren't very close together? A. No.

[338] THE COURT: They cover the same general direction and arrive at the same points sometimes.

MR. HALEY: Yes.

I will ask the reporter to mark these as Defendant's Exhibits 4 and 5.

Q. I show you and ask if you are familiar with what has been marked Defendant's Exhibit 4, which was marked Employees Exhibit 11 in the proceedings before Emergency Board 172. Are you familiar with that? A. No.

Q. Would you look at the list of the agreements that are contained in there, and I will ask if you are familiar with any of those agreements. A. I am reasonably familiar with some of them. I have read most of them at one time or another. Yes, I have some knowledge of them.

Q. Are those the agreements that it is part [339] of your duty to keep up with? A. We have a file of these.

Q. Will you look at Defendant's Exhibit 5 and the list of agreements that are listed there, Crew consist agreements. Are you familiar with those?

* * * * *

A. My answer would be the same, some general knowledge.

* * * * *

Q. If you will quickly go through here, Mr. Wolfe, through Defendant's Exhibit 4, and just take the list and indicate, if you will, the railroads which operate in the same areas in which the North Western or its subsidiaries operate that are listed there? I know the Burlington is in there. A. The first listing is the Luna-Saunders [340] Agreement Railroads. Without going over each one, they are all eastern railroads.

Q. Some of those operate in the Chicago area. Chicago River and Indiana is a switching railroad here in Chicago, isn't it? A. Well, Chicago is the western terminus of some of these railroads, and Chicago is the eastern terminus of the North Western.

Q. Will you just indicate by looking at them the ones that operate here in Chicago the same as the North Western. They have yards here and some main lines running here? A. Erie Lackawanna is one.

Q. The Erie Lackawanna? A. Yes. The Penn Central; the Baltimore and Ohio—that is about it.

Q. And the Baltimore and Ohio has got a Chicago terminal, right? A. Yes, the B&OCT.

Q. What about the Chicago River? That is a switching railroad, isn't it? A. That is part of the Penn Central system.

Q. Would you indicate them by names so the record will show it? [341] A. Indiana Harbor Belt and Chicago River and Indiana are both Chicago switching terminal companies.

Q. And the North Western? A. We certainly operate in Chicago.

Q. It has switching yards in Chicago? A. Yes.

Q. Go ahead and get the rest of them out of there. A. The Gulf, Mobile and Ohio operates into Chicago.

Q. And has yards in the South Side of Chicago? A. Along the Stevenson Expressway, as I recall it.

That is about it, the first page. Milwaukee, of course.

Q. That is the Milwaukee East? A. Well, the Milwaukee Railroad, period.

Q. It comes in here? A. Yes, the Milwaukee East. Then Milwaukee West, I suppose, if you want to divide it up into different regions.

Q. It is covered by two different agreements, isn't it? [342] A. Yes. Milwaukee East would be in the same area as the North Western. Milwaukee West would not be.

The Santa Fe, very loosely, only because of the fact that it operates in Chicago and Kansas City, and has a line to Kansas City, but under your definition, I suppose it would be the same area.

The Burlington; Toledo, Peoria and Western, the same area.

That is all.

* * * * *

Q. Will you look at Defendant's Exhibit 5 and indicate which of those railroads operate in the same area with the North Western? [343] A. Let's see. The Norfolk and Western, formerly the Nickelplate, I think it comes into Chicago. The Rock Island has a Kansas City terminal. We have a yard in Kansas City. Peoria and Pekin Union Rail-

way, and we go through Peoria. The Des Moines Union Railway. The Great Northern has several common points with us. The Belt Railway of Chicago; the Illinois Central; Chicago Shortline is in Chicago. The Chicago and Eastern Illinois touches Chicago. The Sioux City terminal, we do operate to Sioux City. That is a terminal company. The Minnesota Transfer Railway would be similar.

That is it.

[344] Q. Now the railroads that you testified the unions were urging, the railroads which made contracts with the union that were being urged upon you by the union, that was principally the one made by the Burlington, is that right? A. No.

Q. Is that one of them? A. No, that is not right.

Q. Which were the ones? A. More often than not they simply referred to it as a national pattern. That would be all of them.

Q. With certain specific ones? A. However on certain occasions certain general chairmen referred to the Great Northern, the Milwaukee, the Burlington.

Q. The Great Northern, the Milwaukee and the Burlington? A. Those were on certain occasions, but generally it was the national pattern.

Q. Now as you have read these agreements from time to time, do you find any two of them that are identical? A. I find—that are identical?

Q. Yes; that are the same. [345] A. In what respect, Mr. Haley?

Q. Well, do they all establish the same rule, precisely the same rule, or is it the same general rule with varying exceptions? A. Yes, they generally establish the same rule. Over 90 per cent of the jobs would be returned to 1 and 2.

Q. How do you arrive at that 90 per cent figure? A. 90 per cent of the total jobs operated in road and yard service.

Q. Where do they get that information? A. Where do they get that information?

Q. Yes. A. Off of Form A that is supplied the Interstate Commerce Commission of crews operated on Class 1 railroads

Q. So how do you arrive at—you take the reports made by all the railroads in the United States? A. On the monthly agreements that were made, and we have found, as Mr. Moore testified, there is in fact a national pattern, and that pattern is 93 to 100 per cent of the jobs returned 1 and 2.

Q. But the agreements will differ and vary [346] from railroad to railroad? A. In very minor respects insofar as that pattern is concerned that I am talking about.

Q. But they do differ? A. Well, the range is 93 to 100 per cent.

Q. Do you know of any that got 100 per cent back? A. A hundred per cent back? All the Luna-Saunders agreements roads did.

THE COURT: All which?

THE WITNESS: The Luna-Saunders roads, all the eastern roads, did.

BY MR. HALEY:

Q. But the Luna-Saunders agreements did not provide a uniform rule of two helpers in yard service and two brakemen in road service? A. The Luna-Saunders agreement provided just that.

Q. No. Didn't it provide, Mr. Wolfe, for many, many 1 and 1 crews? A. No, sir.

Q. You are sure of that? A. The Luna-Saunders agreements?

Q. Yes. [347] A. Yes, sir; reasonably sure.

MR. SCHMIEGE: Mr. Haley, before you require an answer from Mr. Wolfe, would you show him the Luna agreement?

MR. HALEY: Yes.

BY MR. HALEY:

Q. I think you will find it provides for 1 and 1 where 1 and 1 was the rule before? A. Where 1 and 1 was the rule before Award 282?

Q. Yes. A. Well, that isn't a substantial number, * * *

A. On the North Western, for example, we have three, and I suspect it is virtually the same on other railroads. The Luna-Saunders agreement is basically a 1 and 2 return of all crews, and Mr. Luna has described it as such himself.

Q. With the exception of some crews, and we don't know how many, and I don't think—do you know how many? Can you tell me? A. No, I don't but I do know it is very few. I know that. I couldn't tell you the exact number. [348] It is de minimus.

Q. And that agreement, of course, was made without the threat of a strike and at a time when no strike was possible? A. That agreement was entered into because of the consideration the previous witness testified to.

Q. I didn't ask you that. It was made when there was no strike and no strike was possible? A. Not possible?

Q. Legally not possible because of Public Law 88-108? A. I think that is probably right.

* * * * *

Q. * * * Now, then, the first written proposals that were made by either of the parties, as I understand it, was a proposal that was put in evidence by you, a proposal by the employees, and that is Plaintiff's Exhibit 16, I believe. It proposes a rule of conductor and two brakemen in road freight service, is that right? A. That is the first section, yes.

[349] Q. Now it says it will not disturb the crew consist provisions of Rule 49. That is another rule, apparently, that exists on the North Western. Do you know it by number that way? A. Yes. That is the one I mentioned in my direct testimony that prior to Award 282 it required us to staff certain main line way freights with a third brakeman, and that provision in the agreement was a mistake, really. Rule 49 already had been disturbed, you see, by Award 282, and if they wanted to put it back in, that wasn't the way to do it.

Q. I see. But you took it to mean they wanted certain jobs restored to three helpers or brakemen? A. Exactly. It was an artful way of doing it.

Q. Otherwise they were proposing a conductor and two helpers? A. Aside from that they were proposing a conductor and two. That would be a conductor and three going back before the award, as I said.

Q. Then Section 2 covering all passenger and suburban trains with three cars or less, a conductor [350] and one brakeman. What was the rule prior to that. A. We don't have any rule.

Q. So they wanted a rule where there was none. Now then in Section 3, it talks about passenger and suburban trains, four cars or more, consist of a conductor and two brakemen. Had there been a rule like that before? A. No, sir.

Q. So that was something new. Then Section 3 covered yard service, and they proposed a rule of a foreman and two helpers. A. Right, sir.

* * * * *

[351] Q. Now then, the North Western responded to that proposal with, I believe it is, Plaintiff's Exhibit 20. A. I don't know the number. I can tell you whether it is our first one if you show it to me.

Q. I believe it is Exhibit 20? A. No, that is not the first one. I think the first one would be Exhibit 19.

* * * * *

Q. All right. Then that is the North Western's response to the Union's proposal. A. Well, it is our first proposal.

Q. And in it the union has now proposed a basic rule of conductor and two brakeman or three [352] brakemen on a few crews, a conductor and two brakemen on the rest of the road crews, and a foreman and two helpers in the yard crews. Now, then, what is your response to that? A. Well, as I described it before, our proposal No. 1 is a treatment by individual jobs what we considered the North Western manning needs to be.

Q. What did you consider them, as expressed in your view? Just summarize it for the Court. A. I did, but okay. In Section 1, we specified five jobs that we had worked under 282 with one helper that would be returned to two.

Q. In other words, you proposed then that you would retain, you would increase five—what are those, yard crews? A. Five yard jobs.

Q. Five yard crews from 1 and 1 to 1 and 2? A. That is correct.

Q. Instead of all of them that the union proposed. A. In Paragraph 2 we proposed that three branch line road jobs that had been worked with a conductor and one brakeman for four years under [353] the award would be returned to two brakemen.

Q. Out of how many? A. Out of how many road jobs?

Q. Yes. A. Oh, I think we are presently working about 51 road jobs.

Q. So that is three out of 51? A. That is what we are presently working. We have additional authority, but it is 51 that we are working.

Q. Back to the first one on the yard jobs, you offered to increase five out of how many? A. Five out of 180 that they were working 1 and 1, and about 216—wait a minute. I am wrong about that. Strike it. That is total.

About 129 that we were actually working 1 and 1.

Q. And you offered to increase how many, eight? A. Five.

Q. Five? A. Yes.

In Paragraph 3 we stipulated to all other 1 and 1 jobs would be retained in that position or [354] status.

Then in Paragraph 4 we listed 63 additional yard jobs that we would work with one helper instead of two.

Q. In other words, you proposed to reduce some that you didn't have authority to reduce? A. Oh, absolutely. That is what we need. We don't need the second man on the jobs.

Q. That is your judgment? A. That is our judgment, the judgment of practice, what we have been doing the last

four years, the judgment of all the studies we have conducted. It is based on all of those factors.

[355] Q. Your proposal then was a further reduction in how many crews? A. In yard service it would have been a further reduction of 63.

Q. And that would have resulted in a net loss of 48 or 58? A. It would have just been 63 additional jobs that we would operate 1 and 1.

Q. That you wanted the authority reduced from 1 and 2 to 1 and 1? A. That is right.

Q. But you had proposed you would increase five from 1 and 1 to 1 and 2? A. As I testified before, we have changed conditions. Things do happen on the railroad.

Q. On the balance sheet, you wanted to take away more than you were willing to add to it, is that right? A. We served a proposal, Mr. Haley, as you recall which would have given us complete managerial discretion.

Q. Right. A. And this is simply putting down in writing how we would implement that proposal on the specific job.

[356] Q. But these are the figures? A. Yes.

Q. What is the next part? A. The next paragraph deals with way freight or switch runs that we presently were working 1 and 2, that we would work 1 and 1.

Q. In other words, you proposed further reductions in those crews? A. Most certainly. Absolutely. On many of those jobs as we list them here, an additional thirty, where the second man simply goes along for the ride.

Q. In your judgment? A. In the judgment of myself and our operating department.

Q. With which the union doesn't agree? A. The union insists on its standard return 1 and 2.

Q. They are not willing to accept your judgment? A. They rejected this out of hand, and they refused to discuss both branch line road service and main line road service in any detail.

Q. They did discuss it some? You mean they just said, oh, Mr. Wolfe, we aren't going to talk to you about this?

[357] A. Mr. Haley, that is exactly what they said up until the final two or three days that we met with Mr. Tuffley. That is the first time we really got down to discussing at all branch line road jobs. Yes, that is right.

Q. Of course, your proposal all the way through was to discuss them one at a time? A. My proposal was to do exactly what Mr. Luna told the Court that we ought to do, to analyze each job, the conditions, the characteristics–

Q. Let's go on. A. (Continuing)–and he knocked us out of national handling with that testimony.

Q. He did? A. And brought us down to the local level, and when we got down to the local level, they say let's do it nationally, and use the national pattern.

Q. Mr. Luna was supported by the Court of Appeals, the PRC? A. Yes, and you turn around and do the opposite of what you told the Court we ought to do.

Q. All right. Have we covered the summary of that one? A. No, I am not through. We also proposed [358] that through freight trains make no more than five pick-ups and set-outs, excluding bad orders and hot box set-outs, et cetera, from final terminal to initial terminal, would be worked with a conductor and one brakeman. Those are our manifest hot-shot trains that go from one point to another without working, without making stops, and have absolutely no need on those assignments for the second man.

Q. In your viewpoint. A. In my viewpoint and everybody else on our end of it.

Q. That was your proposal? A. That is right.

Q. And that was delivered by you to the union on June 20, 1964? A. Friday, June 20, yes, sir.

Q. After you had received the union proposal on June 18–I mean 1969. You testified the union proposal you received on June 18, two days before? A. That is right.

Q. Then the union's next written proposal was four days later, was it not? That is Plaintiff's Exhibit 17. You received that on June 24, 1969? A. Yes. That is the second proposal, yes. [359] This is their second proposal.

Q. Will you just summarize for the record so that these are chronologically in the record. What was the union's next proposal? A. Yes. I testified on direct that this proposal, in paragraph 1, would permit us to operate five yard assignments with one helper. That is five of those that we had authority and did operate under 282. It would cause us to restore a brakeman to three under 282 foreman only jobs, and it would cause us to add a third brakeman to certain main line way freight jobs.

Q. It was, of course, a retreat by the union from its first proposal? Maybe not in your judgment a substantial retreat, but it was a retreat? A. Well, it speaks for itself, I believe.

Q. Could you answer the question? It was a retreat.

THE COURT: Was it a step backward?

BY THE WITNESS:

A. Certainly it is not all crews 1 and 2. They would let us operate five with 1 and 1 so–

BY MR. HALEY:

Q. So basically the union first proposed a [360] general rule of 1 and 2 with no exceptions. Your counterproposal was to keep what you had of crew consists of 1 and 1 with thirty exceptions reducing some crews. Now the union comes back with a modification of its basic 1 or 1 and 2 with some exceptions to it, is that right? A. Well, it was no modification or change from the employees' position as stated by Mr. Maloney the first day we met, an 80 per cent return to 1 and 2, and they never retreated from that position.

Q. It is a retreat from the first written proposal? A. It is that, yes, sir.

Q. Then your next proposal following that was, I believe, Plaintiff's Exhibit 20, which is Carriers' Mediation Proposal No. 2, is that right? A. Yes, sir, that is right.

[361] Q. Now if you will just quickly summarize it as to what your proposal was, compared with what the union proposed. A. Well, this proposal, your Honor, very briefly

simply eliminated removing of the second helper from all of the yard jobs and branch line road jobs and main line through freight jobs that were working 1 and 2 at the time we made the proposal. It limits its treatment to 1 and 1 jobs that we had authority to operate under 282, and in that respect it would change five of those jobs from one helper to two. It would change two of the road jobs from one helper to two–

Q. That is seven new jobs that you were willing to increase? A. It would change five of the yard jobs from two helpers to one.

Q. Reduce five yard jobs? A. And change three of the branch line jobs from two brakemen to one.

Q. In other words, reduces those? A. Yes. Now both of our proposals 1 and 2 I might add, also contained a procedure for handling crew consist changes subsequent to the date of the [362] agreement, which as I testified to before is quite important in our opinion.

Q. With the ultimate result being arbitration if you couldn't agree? A. Local arbitration, local third party handling.

Q. Right, and of course you were aware, as you have been throughout this whole crew consist dispute, of the union's opposition to submitting crew consist to final and binding arbitration? A. They normally oppose that, yes.

Q. And of course, you knew that when you made that counter proposal? A. Well, I know that they oppose, that they have opposed arbitration on many occasions, and they have agreed to it on many occasions.

Q. But not on crew consist. They are strongly opposed to arbitration on crew consist? A. I am sure they have probably agreed to arbitrate crew consist matters at times, Mr. Haley. I wouldn't say they have approved it in every instance. I am sure there have been occasions when they have. It is a very sensible solution, and we proposed it as such.

Q. In your judgment. [363] A. Certainly.

Q. When was it that you delivered Plaintiff's Exhibit 20, which is your mediation proposal No. 2, to the union? I

don't have the date on that. A. I would have to check my conference notes on that.

Q. Would you do that? A. Yes, sir.

Q. If the record shows it, I didn't get it in my notes. A. You are talking about carriers' proposal 2, right?

Q. Right. The employees was on June 18th, and your response was June 20th. Now we are down to Plaintiff's Exhibit 20, which is your proposal No. 2, and when was that? A. I believe it was on the 24th.

Q. Of June? A. Yes, that is right—no, I am sorry. I am sorry about that. It was Monday, June 30th.

Q. June 30th? A. Yes.

Q. Then after that the unions made a proposal that was delivered to you on July 1st? [364] A. That is right.

Q. And it has been marked Plaintiff's Exhibit 18. Will you summarize it for the record. A. I think I can summarize this quickly by simply saying that to the five jobs that I mentioned before, that we would be permitted to continue to operate with the one man, it adds three more.

Q. It increases, in other words? It is a little bit more of a retreat from the union's initial position? A. Not from its initial position. It is a little step from its initial proposal, written proposal, that is right. But it is still well within the initial position stated the first day of the conference.

Q. But it is a retreat from the initial proposal? A. Initial written proposal.

Q. Initial written proposal, all right. Then you made the carriers' proposal No. 3? A. I guess it would be—

Q. That has been marked Plaintiff's Exhibit 21? What was the date you gave that to the union? A. Let me see. I believe we handed the [365] Mediator carriers' proposals 3, 4, 5 and 6 on July 1st. We exchanged those with him when we were handed the last BRT proposal.

Q. You gave them all to him at the one time? A. 3, 4, 5 and 6, yes. We had orally proposed three at the preceding meeting. We reduced it to writing and handed it to him on the 1st. In addition, we handed him 4, 5 and 6.

Q. Then let's look first at your proposal No. 3, and if you will tell the Court, summarize it for the record as to what it proposed and what was the change, if any, between it and the last prior written proposal? A. Our last prior written proposal, of course, was a tremendous compromise for us because it came down completely from our proposal. It simply eliminated our proposal, and you must, starting a discussion like this, you have to start with our proposal and the opposition proposal, and so when you consider the carriers' proposal 2, it was a complete comedown off of our proposal and it was a substantial compromise. This one embodied that same principle. It is the same identical proposal from the standpoint of jobs.

Q. That is what we are interested in. [366] A. But it eliminates–

Q. The proposal for arbitration, that is the only thing? A. The proposal for local arbitration which the opposition objected to. That is the only change from proposal 2.

Q. So it reflects no change except, as I say, as to jobs, but only for arbitration. A. It is a complete compromise coming off our proposal.

Q. Of unrestricted managerial prerogative? A. It is not unrestricted managerial prerogative. It is a comedown completely off of the jobs we had listed that we wanted to operate 1 and 1 on proposal 1, which embodied and was put in the proposal on the basis of our notice that we served on the organizations. It was a virtual withdrawal, if you want to so speak, of our notice in written proposal form.

[367] Q. All right. Now the proposals 4, 5 and 6– proposal 4 proposes arbitration again? A. Yes, proposal 4 proposes third party determination of the entire crew consist matter at that time.

Q. In other words, third party determination, otherwise arbitration? A. Yes, sir.

Q. I don't know why we can't call it just arbitration. A. I like to, but some of your people object to that term. I don't know why either.

Q. Then in proposal No. 5, you want to know what the union would trade you for increasing some crews that they sought to increase? A. Yes. As I said, we were examining different approaches in an attempt to get them off this national pattern position.

Q. And on your last proposal, that didn't deal with jobs except to retain what you had on a three-year moratorium and you would trade that, and then you would give the union the five-day work week in suburban service? A. Yes, they had been negotiating that proposal–

[368] Q. It really didn't propose a change in the existing operation of yards or road jobs? A. It proposed a crew consist status quo.

Q. Yes, of what you had. A. That is right.

Q. You would keep what you have for three years? A. And again it was a complete withdrawal of our proposal.

Q. Of your exclusive managerial discretion? A. Of our right to get into mainline road service and other branch line jobs and other yard jobs. We have 750 assignments on the railroad, you see.

Q. But you had authority only to operate a much less number? A. We had authority to operate 216.

Q. So actually what was in dispute– A. Of course, we really have authority to operate far more than that. We have authority to operate 107 jobs in Wisconsin, but because of the Wisconsin full crew law, we couldn't do it. So our authority was well over 300.

Q. But as a practical proposition, it was [369] just over 200. A. That is right.

Q. And that is what is involved here? A. Yes. But my answer wouldn't have been correct if I hadn't made that qualification.

MR. HALEY: I will ask that this be marked Defendant's Exhibit 6 for identification.

Q. I show you, Mr. Wolfe, what the reporter has marked Defendant's Exhibit 6, and ask you if that is the letter that you sent to Mr. Arthur Glover of the National Mediation

Board before mediation commenced? A. Well, it is dated June 5. Mediation commenced on June 2, so it is not before mediation commenced.

Q. Well, concurrently or substantially concurrently with the commencement of mediation? A. It is after we had our first meeting with the organizations and after I had had two meetings with Mediator Glover, yes.

* * * * *

[371] Q. Mr. Wolfe, I showed you these and I would ask you to look again at Defendant's Exhibit 4 what purports to be in it the agreement between the Chicago Milwaukee, St. Paul and Pacific Railroad Company lines east and the Brotherhood and check it and see if it substantially states your understanding of what that agreement was? A. Yes, sir, it does.

Q. Would you summarize it for the record? Don't lose the place. Would you summarize the agreement, then, for the record as to what you understand? A. It permits the Milwaukee to operate 38 jobs with one helper.

Q. In other words, it establishes a general rule of a conductor and two brakemen and a foreman and two helpers with how many exceptions? A. 38.

Q. 38 in yard service? A. Yes, which is, as I recall, something like 96 per cent of their total jobs.

Q. What are the exceptions in road service? [372] A. The exceptions in road service? Well, that is road and yard, the 38.

Q. That is road and yard? A. Yes, sir, that is the total.

Q. Now would you look at the agreement that purports to be the agreement between the Chicago Burlington & Quincy and the Brotherhood— A. Do you have that marked?

Q. Yes, that is 29, I believe it is there. A. I have it.

Q. Does it express what you understood or what you understand to be the agreement between the Burlington and the Brotherhood of Railroad Trainmen? A. It does.

Q. Would you summarize it for the record? A. It permits the Burlington to operate, I think, around 30 jobs with 1 and 1 which is about 93 per cent of their total.

Q. In other words, it again establishes a basic rule of a conductor and two brakemen or a foreman and two yardmen with how many exceptions? A. About 30.

Q. About 30? A. It is another example of a national pattern [373] that the organizations attempted to impress upon us.

Q. Would you look at Defendant's Exhibit 5, what purports to be a copy of the agreement between the Great Northern Railway Company and the United Transportation Union and state for the record whether that reflects your understanding of what that agreement was? A. Yes, sir. This is the agreement and it would permit the Great Northern to operate approximately 20 jobs with one brakeman or helper. I think for the Great Northern it is about a 95 or 96 per cent result. Again, well within the national pattern that Mr. Luna has now impressed upon the railroads.

Q. It establishes a general rule of a conductor and two brakemen or a foreman and two helpers, with those exceptions? A. That is right.

Q. There was no strike called by the union against the Great Northern or against the Burlington or against the Milwaukee East? A. They had threats of strike.

Q. They had threats? A. Yes, they certainly did.

Q. But no strike was actually called? [374] A. No strike was actually called because they settled before they could be struck. They settled because they were threatened to be struck.

Q. Well, that is your opinion. A. That is my opinion, yes.

Q. That is your opinion. A. That is my opinion based on information that has been supplied me.

MR. HALEY: Then I move to strike it because it is based on hearsay.

THE COURT: That may be stricken.

[375] Q. Those were the agreements that were urged upon you by the union, principally? A. No, Mr. Haley. As I said before, the union urged on us all of the agreements that had been made with the other railroads, and it

was expressed in terms of You must take the National pattern which is over 90 per cent returned to 1 and 2 and we will not negotiate anything else with you. It must be that.

THE COURT: What he is asking you is, now that he has summarized these, these are the agreements that they were talking about.

THE WITNESS: It is three of them, your Honor.

THE COURT: Well, that is three of them.

THE WITNESS: Yes, but not all.

THE COURT: This is three of them.

THE WITNESS: Just an example of three.

* * * * *

[377] Q. Did you have anything to do with the [378] proceedings of the Presidential Railroad Commission? A. Yes, sir.

Q. What was your connection there? A. I was one of the Southeastern counsel that represented the Southeastern Railroads before the PRC.

Q. You were one of the railroads' lawyers appearing before the Presidential Railroad Commission? A. One of many.

Q. But you were one of them? A. I was one of them.

Q. You were, of course, of counsel in the proceeding in the case that originated in this court, the Brotherhood of Locomotive Engineers and the other operating unions against the B&O that was tried by Judge Perry? A. Yes, I was with Mr. Neitzert and Mr. Lucente in that case, yes.

Q. Did you represent any of the railroads in any of the proceedings before Emergency Board 154? A. Yes, sir, I was Southeastern counsel before that Board.

[379] Q. Did you participate on behalf of any of the railroads in the negotiations that followed the report of Emergency Board 154 and the enactment of Public Law 88-108? A. No, sir.

Q. Did you participate as representing any of the railroads in the proceedings of Arbitration Board 282? A. Yes, sir; I was counsel for the Southeastern Railroads before Arbitration Board 282.

Q. Did you assist in the preparation of the evidence in the presentation of evidence on behalf of the railroads before that Board? A. I was responsible for the firemen manning portion of that case, Mr. Haley, but not the crew consist case.

Q. Not the crew consist? A. That is right. Mr. Lucente had the crew consist case and I had the fireman's case.

* * * * *

[380] Q. The fireman issue and Mr. Lucente had the crew consist? A. And both of us were supervised quite closely by Mr. Neitzert.

Q. So you were the same ones that had been in the case that originated earlier in this court involving the right of the railroads to promulgate their November 2nd, 1959 notice? A. That is right.

Q. The same group of lawyers stayed with the whole case? A. Well, not exactly. I would not be correct to give you an unqualified answer there. There were some changes, but basically it was the same group.

Q. And you worked with them all the way through? A. Well, each region, you see, at that time the railroads were represented regionally, and each region had its own counsel.

Q. The Eastern Carriers Conference Committee had its counsel, the Southeastern Carriers Conference had its counsel, which you were one, and the Western Carriers Conference Committee had its [381] own counsel? A. That is right.

Q. Then later on they formed the National Railway Labor Conference consisting of all three? A. That is correct.

Q. Then you became general attorney for the consolidated group, is that right? A. Yes, Mr. Charles Hopkins and I became general attorneys of the conference.

Q. You and Mr. Hopkins? A. That is right.

Q. That was in 1964? A. In the summer of 1964, yes.

Q. That was during the time the Award of Board 282 was in effect? A. Yes, sir.

Q. Were you in the capacity of general attorney for the National Railway Labor Conference when the unions served on certain of the railroads their Section 6 crew consist notices in June and July of 1966? A. Yes, sir.

Q. Or '65. A. '65 is when they served the notices, the [382] summer of '65.

Q. Did you have any part in the advice that was given by the National Railway Labor Conference to the railroads upon whom those notices were served and not to negotiate on those notices with the union? A. Are you referring to the position of the railroads that the notices were premature because they were served during the period of the Award?

Q. Yes. A. Yes, I did participate in the legal thinking along with the other lawyers who were working at that time, and along with the Shea firm that handled the case.

Q. In Washington? A. Yes.

Q. So you did have a part in the preparation or determination that your father testified to yesterday of the instructions of the National Railway Labor Conference to the North Western Railroad and others not to negotiate with the unions on those Section 6 notices and to take the position that they were premature and didn't require negotiation at that time? [383] A. Well, Mr. Wolfe consulted with his lawyers normally and took their advice and then made his decision.

Q. After those notices were served, or after the railroads took that position, you were aware, I take it, that the unions sought services of the Mediation Board when the railroads would not negotiate on those notices? A. I believe I testified briefly to that, Mr. Haley. As I recall it, the notices were served in July, and the railroads answered that the notices were premature, and that the organizations began to invoke the services of the Board pretty shortly thereafter.

* * * * *

Q. Late summer and fall? A. That is right.

[384] Q. After the railroads took the position it did on the notices? A. That the notices were premature as being served during the period of the award.

Q. And refused to negotiate on them? A. Because they were premature–

Q. Just answer the question. They did refuse to negotiate? A. Yes.

* * * * *

Q. Then did you play any part or have anything to do with the determination of the National Railway Labor Conference to suggest or direct the North Western Railroad and others to serve the December 1965 Section 6 notices? A. I don't recall. I am sure that the question probably came up and the lawyers were asked their opinion.

Q. Then subsequent to that did you -

THE COURT: May I interrupt?

Did you have the opinion that it would [385] be good strategy to serve such notice in the event your viewpoint should be wrong about the prematurity?

THE WITNESS: Yes. Judge. They had served notices and we thought that normally you want to serve counter-notices to them. However, in the letter that went out we did ask for initial conferences on both their notices and ours in that letter which accompanied our notice, and the unions refused to meet. I mean, that is part of the story and I think you want the whole picture.

* * * * *

Q. The National Mediation Board had been requested to assume jurisdiction of the dispute arising from the unions' June and July 1965 notices.

[386] And then did you appear before the National Mediation Board early in 1966 as one of the attorneys representing the National Railway Labor Conference and the North Western and other railroads urging the National Mediation Board to handle the dispute on a national basis rather than on an individual railroad basis? A. Yes, sir. Only we took off our lawyer hats and we were representing the Con-

ference Committee at that meeting more as negotiators than lawyers, but we did take that position.

Q. You did appear before the National Mediation Board, the full Board at that time? A. It was not the full Board. We appeared before Member Edwards, as I recall. O'Neal was not there, and Gamser came in sometime later. So, it was really before only one member.

Q. You were appearing on behalf of all the railroads urging the Mediation Board to require the unions to engage in national handling and not to handle the disputes on an individual railroad basis? A. Absolutely. That was our position. It had always been handled that way. We were trying [387] to impress the Board with the righteousness of our opinion.

Q. Who participated in that, if I may call it, hearing? A. I wouldn't call it a hearing. It was simply a meeting.

Q. Well, let's see, Mr. Edwards was one of the members of the Mediation Board at that time? A. That is right.

Q. So was Mr. Gamser and so was Mr. O'Neal? A. That is right.

Q. Now then, you were one of the lawyers representing the National Railway Labor Conference and in turn the North Western Railroad; is that right? A. Mr. Charles Hopkins and myself, both general attorneys of the National Railway Labor Conference, were there representing all of the railroads which had furnished the conference with their powers of attorney.

Q. And that included the Chicago and North Western? A. That included the Chicago and North Western; that is right.

Q. As well as the other 80 railroads that had [388] been served with notices? A. Whoever had given us their power we were representing.

Q. Was anyone there from the Shea and Gardner firm? A. No, sir.

[389] Q. Did you make an argument of any kind before Mr.—did you say Mr. Gamser heard you? A. No. Mr. Edwards was the member of the Board who conducted

the meeting. The meeting was between representatives of the employees and representatives of the railroads.

Q. Who represented the employees? A. A number of vice presidents, and there were several general chairmen. The vice presidents that were there that I remember were Mr. Ray Jones–

Q. General chairman Alfred Smith off of the Missouri Pacific? A. Off of the Missouri Pacific. And your eastern general chairman off of the–

Q. Roger Jordan off of the Atlantic Coastline? A. I mean, your eastern vice president–

Q. Mr. Weil? A. Yes, Mr. Weil was there.

Q. Was Mr. Chester there? A. Yes, Mr. Chester was there.

Q. Mr. Jordan off of the Atlantic Coastline? A. That is right.

Q. Alfred Smith and Mr. Green and Mr. Clayton off of the Missouri Pacific? [390] A. I remember there were some general chairmen there but I don't remember all of their names, Mr. Haley. But I do remember the vice presidents because they were the ones who did the talking.

* * * * *

Q. You were heard by Mr. Lev Edwards of the National Mediation Board? A. Yes.

Q. Was he chairman at that time? A. I don't know.

Q. Were you subsequently advised by the National Mediation Board what its position or what it was going to do, whether it accepted or rejected or advised of any decision by the Board in any writing? A. My memory is a little foggy on that.

Q. My recollection is that you were. A. I think that is probably right. The Board did–

Q. Reject your contention. A. Well, I am not sure it was an outright [391] rejection in terms–in writing, but the Board did begin to release individual cases.

Q. They began to mediate on a railroad by railroad basis? A. As I say, released, yes, mediate–or assign a mediator to certain railroads.

Q. In other words, they didn't go along with your argument whether it was a formal decision or not? A. As I say, they simply released some railroads so they didn't do exactly what we asked them to do.

Q. They proceeded on an individual railroad basis? A. They started to, yes.

Q. About this same time in January of 1966 the Akron, Barberton and Belt case was filed? A. Yes.

Q. It was filed, you recall, the date—if I suggest to you January 21, 1966, would you agree with that? A. I probably would. I am sure you know. If you say that is what it was, I will agree.

* * * * *

[393] Q. But the Akron, Barberton and Belt case we are speaking of, it was the first named of some 170-odd plaintiffs? A. Well, there were a lot of them. I don't know if it was 170 or not. If you say so, I will accept your word for it.

* * * * *

Q. Of which the North Western was one of the plaintiffs? A. That is right.

* * * * *

[394] Q. Subsequently, Judge Holsoff rendered an opinion that the 1965 notices became effective January 25, 1966 and subsequently, then, did you participate in the decision to advise the railroads to undertake initial negotiations on the properties? A. Yes, I think I did participate insofar as advising our clients, the negotiators, what we thought should be done.

Q. But by that time the National Mediation Board had assumed jurisdiction of the disputes arising from all of the notices served by the [395] union and all of the notices–counter-notices served by the railroads? A. It had assumed jurisdiction?

Q. Yes, and had given the disputes separate numbers. A. Well, the Board did give them separate numbers because mediation was invoked at different times by the organizations.

Q. Right. So they had docketed the disputes? A. They had docketed a number of the disputes, yes. But the Court, of course, had held in Akron, Barberton that the meetings were ineffective, the initial conferences, you see.

* * * * *

[396] Q. Then the mediation continued until late in 1966—the Mediation Board terminated its services first on the Atlantic Coastline, Boston and Maine, and Des Moines Union Railroads? [397] A. That is right.

Q. Did you participate in the determination to file what became known as the Atlantic Coastline case? A. Yes, as I recall, the conference lawyers gave their opinions to their clients on that matter.

Q. In that case you contended that the refusal of the unions to bargain on a national basis as the railroads had demanded was a violation of the unions' duty under the Railway Labor Act? A. That is right, * * *

* * * * *

Q. During the time those cases were pending [398] no negotiations were carried on on the North Western Railroad or any others that you know of? A. You are now speaking of the Atlantic Coastline litigation?

Q. Yes. Well, in the Akron, Barberton and Belt litigation, that was still going on too? A. Once the litigation was filed, the Mediation Board simply did not assign mediators and no negotiations were conducted. You are right.

* * * * *

[399] Q. While those cases were pending, the Mediation Board did continue mediation because before either one of them was concluded, either of the two lawsuits or before the Akron, Barberton and Belt case was concluded, the Mediation Board terminated its services in the Atlantic Coastline, Boston and Maine and Des Moines Union disputes? A. I was talking about, Mr. Haley, while the [400] Atlantic Coastline case was pending, which raised the question of national handling.

Q. All right. A. The Mediation Board did not activate any of the cases and assign mediators. I assume that is the reason a mediator was not assigned on the North Western.

[401] Q. Immediately after the Mediation Board terminated its services on the Atlantic Coastline, Boston and Maine and Des Moines Union, within two weeks it terminated its services on the GM&O? A. Yes.

Q. Within a month after that it terminated its services on the Southern, the Missouri Pacific, the Union Pacific, the C&O that I can think of now. A. When were those dates, do you remember?

Q. It terminated its services in November of 1966 just after the Atlantic Coastline case was filed. Because subsequent to that, if you will recall, the C&O case was filed in the District of Columbia after five different lawsuits had been filed in five different places; Cleveland, St. Louis– A. But those terminations came, didn't they, after the Court of Appeals had ruled?

Q. No. While they were pending.

* * * * *

[402] Q. So the Mediation Board continued mediation? A. Not on the North Western.

Q. There is nothing, so far as you know, to prevent parties from negotiating while the case is in mediation, is there? A. Well, but you see–no, there isn't anything as long as the parties agree on the procedure to follow. That was the dispute that was in the courts. The railroad took the position that this was a matter for national handling. Mr. Luna took the position that on crew consist you had to go back to the–to each individual railroad because of the conditions on each railroad and bargain it on each railroad. So, obviously if either side–to negotiate one side would have to give up its position.

Q. Of course, I understand it takes two to tango. But the railroads made no effort to settle the dispute except through the litigation? A. Well, neither did the unions. The reason for it was because of the litigation.

[403] Q. I have particularly in mind the Norris-LaGuardia Act when I ask this question: Did the railroads make any effort, during the time that litigation was pending, to resolve the dispute by negotiation?

THE COURT: You mean the North Western?
MR. HALEY: The North Western.
THE COURT: You are talking about the North Western?
MR. HALEY: Including the North Western.

BY THE WITNESS:

A. The last effort the North Western made was rejected by the unions. In fact, the North Western made three offers to negotiate and the unions rejected those offers.

BY MR. HALEY:

Q. They made no attempt to negotiate on national handling? A. There were meetings in January, * * * in June of 1966 and in [404] August of 1966. The North Western made offers to negotiate in March of 1966 which were rejected by the union.

* * * * *

Q. And nothing more until after the Supreme Court decided—or denied certiorari in the Atlantic Coastline and Akron, Barberton and Belt case in January of 1968? A. Mr. Haley, the North Western had gotten a letter from the National Mediation Board telling us a mediator would be assigned to the case when the board's schedules permitted it. In the parlance of railroad procedure you wait until the Mediation Board assigns a mediator. That is the way every dispute is handled, and that is what happened here.

Q. There is nothing required or preventing any railroad from seeking agreement during that time, was there? A. Well, the customary procedure and the normal way of handling labor relations under the Railway Labor Act and in this industry is just as I have described.

Q. But the North Western so far as you know did not— [405] A. We were awaiting the assignment of a mediator.

Q. And awaiting the outcome of the litigation? A. At the same time, yes.

Q. Now then, after the Supreme Court denied certiorari in the Akron, Barberton and Belt and Atlantic Coastline case in January of 1968, did you attend a meeting of representatives of the Illinois Central Railroad, the North

Western Railroad, the Richmond Fredericksberg and Potomac, the Louisville and Nashville, and the Kansas City Southern with respect to offering money to settle the crew consist issue? A. No, sir.

Q. You were still at that time connected with the National Railway Labor Conference? A. That is right.

[406] Q. Were you aware that such a meeting was held? A. No, sir.

Q. Let's see, when did you take over? You were elected– A. April 3, 1968. I was elected but I did not come in full time with the North Western until June 1st.

Q. You didn't have anything personally to do, then, with the decision of those representatives of those railroads to seek to settle crew consist for $3.45 instead of an additional man? A. I was not at that meeting. I did not participate in it.

Q. When did you learn of that meeting and of that offer, or that proposal? A. Immediately upon being elected vice president of the North Western, I believe, the 1st of April or during the first part of April.

Q. Were you aware of the conduct of the Illinois Central and the Louisville and Nashville and the Richmond Fredricksburg & Potoma, and the Kansas City Southern in attempting to settle the crew consist dispute with the employees for $3.45? [407] A. The way that you phrased the question, Mr. Haley, I will answer it this way: I was aware of those railroads communicating through their house organs and otherwise with their employees, but I was not aware of any effort to settle it with the employees.

* * * * *

Q. You were aware of the communications, then, that were going on from the various railroads to their employees? * * * A. Yes, that is right, I was aware of them. But we on the North Western did not engage in any of those communications after I arrived at the North Western.

Q. None? A. None.

Q. You served no Section 6 notice on the unions proposing a disposition of the crew consist [408] issue by the

payment of additional money? A. A letter was sent to our general chairman in March of 1968 proposing that the matter be settled by paying our incumbent employees a thousand dollars a year extra.

Q. At the rate of $3.45 a day? A. That is right, $3.45 a day. That was summarily rejected. We sent copies of that letter to our employees. That was done before I came to the North Western and that was after—and we accepted the general chairman's rejection. Once I came to the North Western we did not communicate anymore with our employees in that respect.

Q. It was not treated as a Section 6 notice, is what I am trying to arrive at. A. It was a part of the handling of the crew consist dispute, the notices that were presently pending, Mr. Haley.

Q. It wasn't pursued as a Section 6 notice? A. Well, we already had Section 6 notices.

Q. I mean, that the money offer was not—

THE COURT: It was not considered separately as a Section 6 notice?

[409] THE WITNESS: No, Judge. It was a part of the pending dispute.

THE COURT: Well, he wants to pin it down that you did not start a new Section 6 notice.

THE WITNESS: No, it was not a new Section 6 notice.

* * * * *

Q. You didn't mention money in your negotiations with the union again until just during the Mediation proceedings, as you testified earlier, which occurred this year? * * * A. Yes, I was exploring every possible approach. I simply brought that up and I said, [410] "Would you fellows at this time be interested in money?" And they said, "No."

Q. That was the next time— A. Yes.

THE COURT: That was not in pursuance of that original notice as a Section 6 notice, but what you did then was just in pursuance of further negotiation of the original Section 6 notice?

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THE WITNESS: That is right, Judge.

* * * * *

Q. I believe you testified that negotiations were commenced on the 1965 notices as a result of a meeting between Mr. Luna and Mr. Heineman, and you mentioned somebody else– A. Mr. Provo, our president.

Q. Allright. That occurred in March of– A. March 19th, 1968.

* * * * *

Q. Then, almost three years since there had been any talks, any crew consist talks between the union and the Chicago North Western? A. No.

[411] Q. In '65? A. In August of '66.

Q. August '66. Then almost two years, then? A. Well, August '66 to March of '68.

* * * * *

Q. Following that then, of course, you made some studies of the crews as to how they were being operated, whether they number that were being operated with a conductor and two brakemen or a foreman and two switchmen and the number that were authorized to be operated with less than that and the number that were really being operated; is that right? * * * A. Are you referring, Mr. Haley, to the studies that Mr. Luna and Mr. Heineman and Mr. Provo discussed at that meeting?

Q. And that was subsequently made, I believe you testified. A. Well, I just wanted to know which one you are talking about.

Q. Those are the ones I am talking about. [412] A. Yes, at that meeting Mr. Luna contended that 1 and 1 operation was inefficient because we were spending a lot of money on overtime. He said that his people had figures to that effect and that they had made studies. Our representatives indicated that we would immediately set down and make studies and we would exchange those studies.

At the first meeting on May 16th I gave them my study but they never gave me anything to this day. So there was

no exchange. We gave them a study and they gave us nothing. Those are the studies you are talking about.

Q. Let me ask you this: Do you, as the vice president of personnel and the contacts you have, do you really have to have a job study, a study job-by-job to form a judgment as to whether that crew can safely do the work it does with less than two helpers or with only one? A. I think, Mr. Haley, in my own opinion on a subject such as that you certainly should make a job study unless you had made one recently on the same job in order to see exactly how the job is operating. Mr. Luna testified to that effect. He indicated that that should be done. He and I agree on that.

[413] Q. Let's just take practical operating men. Have you ever switched any boxcars? A. No, I don't believe I have. I sure watched a lot, though.

Q. Would you say that a General Chairman who commenced as a switchman and represents switchmen or a General Chairman who was a brakeman and who represents brakemen or a conductor and represents conductors needs a job study in order to form a judgment as to whether the work of a particular crew requires to avoid an undue work burden or a safe operation one or two helpers? Does he have to have a time and motion study in order to form a judgment of that? A. He has to know what the job is doing in concrete factual terms, not in speculation. He has to know how many cars it is handling. He has to know how many hours the job is being worked. He has to know the physical conditions of the terrain where the job he is working. He has to know the nature of the work the job does. That is, in my opinion, Mr. Haley—that is my opinion, but it also is Mr. Luna's opinions. It is the opinion, I think, of almost anyone who has ever discussed this subject.

[414] You have to know what the job does in order to make an evaluation. You don't get that by osmosis.

Q. You get it by day-by-day personal contact with the work? A. By obtaining the facts as to what the job does, and those facts change.

* * * * *

[415] Q. One thing, Mr. Wolfe, so we can get it straight. One of the contentions that you make here in this case is that the union has not acted in compliance with the Railway Labor Act in refusing national handling at this point. How would you conceive of the union engaging in national handling at this point, which you are aware, I am sure, when the union has reached an agreement with practically every other railroad in the United States? Now how would we go about this? What is your contention? A. Well, Mr. Haley, our contention is that the unions have used local handling to create a national pattern. And here they aren't engaging in local handling. You see, they haven't met us on the local grounds. They have told us that we have to do what the other railroads have done and the other railroads have all had to do the same thing. Therefore, all we are saying in effect is that if in fact if the union has engaged in good faith bargaining then in fact this must be handled nationally because that is the kind of bargaining they have conducted. The way they would do it is simply serve a notice. [416] All of these agreements are open end. Serve a notice and handle it concertedly like crew consist was always handled. It is a very simple matter.

[417] Q. Then you would suggest at this point the UTU now re-serve a crew consist notice on every railroad on which it has now reached a crew consist agreement and also serve another one on the Chicago and North Western and then that we reinstitute this dispute all over again and handle it nationally like it was done from 1959 on? Is that what you are suggesting? A. Mr. Haley, what I am suggesting, if I may put it in my own words–

Q. I wish you would. A. –is that if we are correct in our position, our alternative position that this matter is one for national handling, then the union in fact has made

all of these agreements unlawfully with all of these railroads because they did it on a local basis in accordance with the ACL decision. And in that case, certainly the union should be forced to go back and do it on a national basis by serving notices on everyone.

Q. In other words, we should undo all of the agreements that have been made? A. If it was done unlawfully I should certainly think so.

[418] Q. Then we should start all over and go back to where we were November 2nd, 1959; is that what you are suggesting? A. I am suggesting that we should go back to where we were at the expiration of Award 282 and start from there by eliminating—by taking a look at what is an appropriate crew consist.

Q. Then we should go back and proceed on a national basis so that if we didn't reach an agreement on a national basis we could have another national emergency and another compulsory arbitration; is that what you are suggesting? A. Oh, I am not suggesting that at all. How many national emergencies do we have? This industry has been engaged in national handling for years. You can count the national emergencies on one hand. The crew consist matter was handled nationally up until Mr. Luna convinced the Court of Appeals in the District of Columbia that it should be handled locally. The only national emergency we ever had, Mr. Haley, was the one that stemmed from the 1959 notices.

All I am suggesting is that if Mr. Luna got these railroads in this position in an unlawful [419] manner then the matter should be handled in a lawful one which is national handling.

Q. Wasn't it the railroads' proposed action in 1963 that precipitated a national emergency? A. In 1963?

Q. Yes. The railroads' promulgation of its November 2nd, 1959, notice. A. Well, the promulgation doesn't cause any national emergency.

Q. Not if the unions want to live with it. A. That is right. Exactly. The strike is what causes the national emergency.

* * * * *

Q. In your testimony about being urged by the union or other agreements made by the union with other railroads being urged as a basis for settling the unions' dispute with the North Western you regard that as an improper move on the part of the union? [420] A. I certainly do, Mr. Haley. Mr. Luna said before in the Atlantic Coastline case that insofar as wages were concerned he could not have—he could not afford to have different settlements in the same yards at the same locations. But he said insofar as crew consist is concerned, that matter should be handled individually because the conditions in each yard are different, whether there are four yards in Chicago or 20 yards in Chicago, and it should be settled by each road individually on its own conditions. That isn't what they did with us. They said you must do what these other people did.

[421] Q. That was also a position that the carriers took before Board 282, wasn't it? A. What?

Q. That conditions vary from yard to yard from time of year to time of year. A. Yes.

Q. Then you would disagree with one of the guidelines established by Board 282— A. I don't disagree with any of the guidelines established by Board 282, Mr. Haley.

Q. Let me ask you about this one: Is this one of the? That the Special Boards of Adjustment should take into account practices regarding the consist of crews in comparable situation where such practices are not in dispute and yet you urge that where the parties had settled them by agreement those agreements should not be urged upon the North Western as a comparable situation? A. Mr. Haley, I am saying that the imposition by the unions of a return to a 1 and 2 status is handling the matter nationally by using whipsaw strikes locally and that is exactly what they are trying to do to us. They did it continually through our negotiations. They took away the strength of [422] the bargaining unit by Mr. Luna's testimony that this was a matter for local handling, and then when we go to local handling they attempt to impose a national rule on us.

Q. Mr. Luna's position in the Atlantic Coastline case—were you there when he testified or have you read his testimony? A. Yes, I was there and I read it.

Q. —was that national handling had never been had absent agreement between the parties, and that it was inappropriate on certain subjects including crew consist. A. Well, yes, he testified that national handling was inappropriate and that is one reason the Court of Appeals ruled that it was. But then his organization has turned around and attempted to impose national handling on us individually.

Q. He also testified that national handling had never been had except by agreement and that without an agreement national handling was not permissible. A. Of course, that isn't so. It has been handled without agreement. The National Mediation Board has conducted mass mediation on a number of [423] cases, which is concerted national handling without the agreement of either side.

Q. That is the mediation, but the movement was not agreed to as such. A. The Board simply brought the parties in, but I don't think that is too important here.

[424] Q. Actually, as a matter of fact, up to this point the North Western has not actually been threatened with a strike, has it? A. Well, Mr. Haley, on that, I have testified to the conversation that I had with Mr. Tuffley where I stated that I would not bargain under the threat of a strike. He testified as long as we conferred they would not use self-help, however, they broke off negotiations after they were free to strike, and I considered that as a threat.

Also, when we broke up negotiations several of the general chairmen were heard to say, "All right, boys, let's get the placards and the signs ready." So, there were a number of things that happened that indicated—affirmatively indicated to us a threat of strike.

Q. Now you spoke a lot about whipsaw strikes and that sort of thing. I want to be sure that we understand each other.

The only strikes that have actually occurred over crew consist were Atlantic Coastline, the Missouri Pacific, the L&N, the Belt, and the IC; is that right?

THE COURT: So far as there has been any [425] evidence here.

MR. DEMPSEY: The L&N twice, Mr. Haley.

MR. HALEY: Pardon?

MR. DEMPSEY: The L&N twice.

MR. SCHMIEGE: The L&N was struck twice.

MR. DEMPSEY: And the Texas and Pacific and the T&P.

MR. HALEY: Well, the T&P is part of the Missouri Pacific.

THE WITNESS: It is a separate railroad.

* * * * *

I can't disagree with my lawyers. If my lawyers say yes, I am not going to disagree with them. There were many other threats, though, on other railroads.

* * * * *

Q. But those are the only ones that occurred? A. Actually struck, yes.

Q. There was a promulgation by the Southern which didn't provoke a strike? A. Are you referring to the promulgation by the Southern at the time the Atlantic Coastline was struck and the Missouri Pacific?

Q. Yes. [426] A. Yes, certainly they didn't strike because the carriers were attempting to maintain the integrity of the bargaining unit and it was part of the unions' strategy not to strike.

Q. But they didn't strike? A. No, it was part of their bargaining strategy not to.

Q. But they didn't? A. They didn't.

Q. Okay. Now you have answered the question. Thank you.

The Boston and Maine promulgated and there was no strike? A. The same thing, part of the union bargaining strategy, they did not strike.

[427] Q. The Union Pacific promulgated and there was no strike? A. The same thing, part of the unions' bargaining strategy not to strike.

Q. The C&O didn't promulgate and there was not a strike. A. They did not, no.

Q. But they had the right at the same time. A. Once again, part of the unions' bargaining strategy. They wanted to isolate the ACL and squeeze it, whipsaw.

Q. You would consider, I guess, the whipsaw to be immoral but not illegal? A. Absolutely.

* * * * *

Q. Back to patterns, it has just been suggested to me—the unions are not the only ones that follow patterns, the railroads follow them just as well when they can, don't they?

Isn't that your purpose in national handling? [428] A. You are talking about wage cases, Mr. Haley.

Q. Well, let's talk about them all. You say there ought to be a national handling in everything. What is that but pattern negotiations? A. Well, we argued that this case should be handled nationally. We argued that the crew consist would, but the Court of Appeals of the District of Columbia circuit held that it should be handled locally.

THE COURT: May I ask this question: If this case had been, so to speak, handled nationally, in what manner would the negotiations have been different?

THE WITNESS: Well, Your Honor, the negotiations would have been considerably different because we would have maintained the integrity of our bargaining unit and there would not have been a restoration of all of these 1 and 2 jobs.

BY MR. HALEY:

Q. The end result, absent agreement, would have been exactly what was about to occur and what Congress prevented in 1963, wouldn't it? [429] A. But you would have had to strike them all at the same time. You could

not have whipsawed them and the result would have been tremendously different.

Q. In other words, the railroads feel they would benefit–

THE COURT: Is it your position, then, from a national handling the only difference would be that all of them would be handled together and they would all have to strike or non-strike; is that your position?

THE WITNESS: Yes, Your Honor. The result would have been different because of that.

BY MR. HALEY:

Q. The railroads attempting to act nationally in the machinist case that was settled today, were the railroads there again acting concertedly? A. Yes, sir.

* * * * *

CROSS EXAMINATION
(Resumed)

[433] Q. Mr. Wolfe, I am going to show you what has been marked by the reporter as Defendant's Exhibit 7, and you have a copy of it in your hand; that is the notification by the National Mediation Board of its termination of its jurisdiction of the [434] dispute between the Union and the Chicago North Western? * * * A. Yes, this is, as we call it, the closing file letter.

Q. That is addressed to you and Mr. Luna? A. That is right.

MR. HALEY: Your Honor, we offer Defendant's Exhibit No. 7 into evidence.

* * * * *

THE COURT: Admitted.

* * * * *

REDIRECT EXAMINATION

BY MR. SCHMIEGE:

Q. Mr. Wolfe, when you testified yesterday, Mr. Haley asked you what you thought the union should be required to do if it had improperly refused [435] to engage in

national handling. You said to him that no circumstances the union should not be permitted to require the Chicago and North Western to negotiate individually but rather that negotiations should be handled on a national basis. You also referred to this as an alternative issue. Would you explain what you meant by that, please. A. Yes. As I said yesterday, national handling is one of our issues. If the Court should rule that this is a matter for national handling, then the only way you could effect changes in crew consist rules would be by that method. However, we do have another issue. If we are right on the other issue, the Court need never reach the issue of national handling. This other issue involves the North Western.

Very briefly, the other issue is this: We say that the union refused national handling. We say that it represented to the District Court in the Atlantic Coastline case that national handling was not appropriate. We further say that the union represented to the Court in that case that the appropriate way to negotiate was on a local basis predicated on a close examination of local conditions [436] on each railroad. We say that the Court ruled—the Court of Appeals ruled on those representations that that was in fact the way to do it. We say, that being the case then Section 2, First, obliges the union to proceed in that manner. But as I testified yesterday, that is exactly what they have not done on the Chicago and North Western.

Throughout our negotiations on the North Western, from the very first, they have insisted on a national pattern of agreement. From the very first they insisted on a return of 80 per cent of the jobs to a 1 and 1 basis, and on our last meeting they ended up right at about that position. It was a take it or leave it proposition. That simply is not negotiating.

Now if we are right on that issue, then, of course, what we are asking the Court to do is to restrain a strike unless and until the union engages in honest to goodness negotiations on the merits, on the dispute on the Chicago and North Western Railroad.

Now, in these meetings we took the position that that is exactly what the right thing to do, that is what the right thing to do is for the [436-A] railroad and its employees. We insist that the union having made these representations that that is the manner to handle this dispute, that it should be held to its word. That is the other issue.

Q. I have one more thing to ask you about National handling. At one point in your cross examination yesterday, the Court asked you what difference there would have been had this dispute been handled nationally. You pointed out that the union would not have been able to conduct whip saw strikes and destroy the strength of the railroads' bargaining unit. You also said that the results would have been different. What did you mean by that? A. Well, here is what I meant by that; the result of the union being able to employ all of its strength against a single railroad in whip saw fashion in order to obtain a national agreement is simply that there is no discussion on the merits. The bargaining power is overwhelmingly on one side. The union simply states its demands. The railroad can try their best, but when bargaining is conducted in that fashion, when the bargaining unit is broken, the company is simply whistling in the wind. And that is exactly what happened on the North Western. That is what happened on these other [436-B] railroads. And the result, of course, is strife and strikes one after another. And with forced settlements of this kind where there is no give and take on the merits, the agreements that have been made won't hold. These railroads that have made these agreements, they know that they have been done in returning all of these jobs to 1 and 2.

* * * * *

* * * I will shorten it up. What I am really saying is the only way to have stable relations is for the parties to sit down and debate the merits, how many men are really needed in terms of safety work load, operating conditions, examine the records on overtime, the cars handled, et cetera.

Now the result, of course, in that kind of [436-C] a give and take is that neither side will be entirely happy with the result. But both sides are likely to think that the result is within the range of reason. That is what I meant when I said the results would be different.

* * * * *

* * * It is certainly true that in attempting to estimate what might happen if this matter had been handled nationally, I can't say exactly. But experience does indicate that if it had been handled nationally, we probably would have had a uniform disposition on issues such as job protection, the procedures the parties were to follow, the guidelines that were to be employed on each railroad, and of course, the final step would be an implementation locally of those guidelines. Now, that is what I think would have happened. The short of it is you would have had out of national handling something that the parties could have lived with if there actually had been a give and take on the merits of the dispute. In my opinion, that is what bargaining under the Railway Labor Act is all about.

* * * * *

[437] Q. Now yesterday you told Mr. Haley that in the final week of discussions with the union, that would be in November of 1969, that you would not negotiate under the threat of strikes, but on direct testimony when I asked you a question in that area you said that you had told Mr. Tuffley that you had not—that you would not "care to" negotiate under threat of strike.

Can you explain that little variation in language? A. Yes, I can. I misspoke the second time. My original testimony was right. Of course, I would bargain under threat of strike or under an actual strike. What I meant was that in my view our discussions would be more productive if they were conducted not under a strike threat.

* * * * *

[PLAINTIFF'S EXHIBIT 13]

GENERAL GRIEVANCE COMMITTEE
BROTHERHOOD OF RAILROAD TRAINMEN
CHICAGO & NORTH WESTERN RAILWAY

March 14, 1968

Mr. A. E. Myles
Director of Labor Relations
C. & N.W. Railway Company
Chicago, Illinois

Dear Sir:

This will acknowledge your letter of March 8, 1968, addressed jointly to Mr. W. H. Callies, General Chairman, Order of Railroad Conductors and Brakemen and to the undersigned, relative to the pending crew consist notices on this property.

It is noted that, after having resorted to every device at the command of the carriers to delay and prolong this dispute, including the federal courts, and after having refused to bargain on technical grounds in disregard of the provisions of the Railway Labor Act, you now come forward with an offer to substitute money for a safe crew compliment—a settlement which is contrary to the policy of this organization as you are well aware.

We are not willing to enter into negotiations on such a proposal, and you are hereby advised that same is not acceptable.

Presently, the dispute is under the jurisdiction of the National Mediation Board, and we are awaiting the assignment of a mediator. We should be willing to enter into formal discussions with you in an effort to reach a settlement in the interim period to expedite the matter, with the understanding that if a settlement is not reached, our efforts will not disturb the status of the pending request for mediation.

Please advise if you desire to make an attempt to reach a settlement pending mediation.

Yours truly,

/s/ Gerald R. Maloney
General Chairman

[PLAINTIFF'S EXHIBIT 14]

March 8, 1968

Mr. W. H. Callies
324 East Wisconsin Avenue
Milwaukee, Wisconsin

Mr. G. R. Maloney
14 East Jackson Boulevard
Chicago, Illinois

Dear Sirs:

Please refer to previous correspondence concerning the ORC&B's Section 6 notice of March 23, 1965 and the BRT's Section 6 notices of July 6, 1965 relative to your desire to amend the existing agreements to provide that in all classes of road service the minimum crew should consist of not less than one conductor and two brakemen, and in all classes of yard service the minimum crew should consist of not less than one yard foreman and two helpers, and the carrier's counterproposals of December 24, 1965 to the BRT concerning consist of road and yard crews.

For the purpose of disposing of these notices, and without prejudice to my position that the ORC&B notice is unlawful and not a bargainable matter, I am willing to enter into an agreement providing for an additional allowance of $3.45 to the conductor or yard foreman, and $3.45 to the brakeman or helper, on each crew in road freight or yard service consisting of a conductor and only one brakeman, or a yard foreman and only one helper, with the understanding that this agreement will also provide for the

use of radios by yard or train service employes without any additional allowance.

These are particularly critical moments in history for the railroads and the thousands of persons they employ. Faced with an unprecedented onslaught of competition from trucks, barge lines, pipelines and airlines, railroads must stay in competitive trim. The days when railroads could simply pass along higher costs to the shipping and consuming public are long since gone . . . with the wind.

This intensive competitive pressure makes it imperative that both railroad management and railroad employes work to enable the industry to meet the competition—indeed, to make the competition. We sincerely believe that where management is able to eliminate unproductive positions, thus streamlining its operations, the industry will become more competitive. This, in our judgment, will mean more business and more jobs.

Still, progress is never one-sided. Railroad management believes that when competitive efficiency and productivity increases, resulting benefits can and should be shared. We believe our present proposals for higher pay for men working on one-and-one crews fairly recognize the wage-productivity principle.

If you are agreeable to disposing of the matter in this manner, please advise and we will prepare a memorandum agreement to cover.

[PLAINTIFF'S EXHIBIT 15]

CHICAGO AND NORTH WESTERN
RAILWAY COMPANY
LABOR RELATIONS DEPARTMENT

March 13, 1968

ALL CONDUCTORS AND TRAINMEN:
YARD FOREMEN & HELPERS (Except M&StL Dist.):

The crew consist issue, which involves formal demands from the ORC&B and BRT for a rule providing for one conductor and two brakemen and one yard foreman and two helpers for all crews in road and yard service is enormously important to everyone—employes, management and the general public.

Because of the importance of this to you and your families we feel it is essential that you be informed of the progress and status of efforts to resolve the issue and particularly to the proposals made by management. Our proposals would, in our judgment, result in a fair, honorable and peaceful resolution of the issue.

Specifically, for members of one-and-one crews in road freight and yard service, management has offered to increase your pay by $3.45 daily. This means a wage increase for you of at least $75 a month, or about $900 annually.

It's hardly news to anyone, no matter where he works, that the cost of living keeps spiraling. Prices for everything from box cars to bread, microwave to milk, keep going up. And just as surely as housewives must constantly seek to provide the best meals for her family out of funds available, so too must corporations strive to live within their budgets.

These are particularly critical moments in history for the railroads and the thousands of persons they employ. Faced with an unprecedented onslaught of competition from trucks, barge lines, pipelines and airlines, railroads must stay in competitive trim. The days when railroads could

simply pass along higher costs to the shipping and consuming public are long since gone . . . with the wind.

This intense competitive pressure makes it imperative that both railroad management and railroad employes work to enable the industry to meet the competition—indeed, to make the competition. We sincerely believe that where management is able to eliminate unproductive positions, thus streamlining its operations, the industry will become more competitive. This, in our judgment, will mean more business and more jobs.

Still, progress is never one-sided. Railroad Management believes that when competitive efficiency and productivity increases, resulting benefits can and should be shared. We believe our present proposals for higher pay for men working on one-and-one crews fairly recognizes the wage-productivity principle.

Perhaps most important of all, however, we believe it is essential that you, our employes, be kept thoroughly informed of what efforts are being made to resolve these difficult questions. Only then can you give these questions the thoughtful consideration they deserve. They are much too important to all of us for it to be otherwise.

/s/ J. M. Van Patten
Vice President-Labor Relations

[DEFENDANT'S EXHIBIT 6]

CHICAGO AND NORTH WESTERN RAILWAY COMPANY
400 WEST MADISON STREET, CHICAGO 60606

JAMES R. WOLFE
VICE PRESIDENT-LABOR RELATIONS

June 5, 1969

Mr. Arthur J. Glover
National Mediation Board
c/o - Atlantic Hotel
316 South Clark Street
Chicago, Illinois 60604

Re: Mediation Cases A-7523 and Sub 1, A-7524 and Sub 1, A-7525 and Sub 1, A-7526 and Sub 1, A-7645 and Sub 1 and A-8011

Dear Mr. Glover:

As you know, we welcome the assistance of the National Mediation Board in the above listed cases, and will fully cooperate with the Board in an effort to arrive at a fair and reasonable agreement. Nevertheless, as I said at our opening session, I would not want this willingness to be construed as an abandonment of our legal position respecting the demands of the parties and the crew consist negotiations that stem therefrom. Briefly, we have believed from the outset, and continue to believe, that these demands and the negotiations that spring from them are appropriate only for national handling. Moreover, we do not believe that to date the UTU or its predecessor organization, the BRT, have bargained in such fashion as to discharge their obligations under Section 2, First of the Act.

We are aware that it is not the function of the Board to pass upon questions of this sort. I simply want to avoid any possible misunderstanding and to assure you that, notwithstanding our views respecting the requirements of the

Act and without abandoning our rights in any respect, we will make every effort to dispose of this dispute during the mediation sessions.

Very truly yours,
/s/ J. R. Wolfe

CC: Mr. T. A. Tracy
Executive Secretary
National Mediation Board
Washington, D.C. 20572

[DEFENDANT'S EXHIBIT 7]

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

October 16, 1969
Case No. A-7524 Sub 1

Mr. J. R. Wolfe
Vice President-Labor Relations
Chicago & North Western Railway Company
400 West Madison Street
Chicago, Illinois 60606

Mr. Charles Luna, President
United Transportation Union
15401 Detroit Avenue
Cleveland, Ohio 44107

Gentlemen:

We have been advised by Mr. Charles Luna, President, United Transportation Union, in answer to our letter addressed jointly to your respective carrier and organization, under date of October 8, 1969, that the organization has declined, in writing, to arbitrate the question in our Case No. A-7524 Sub 1, as set forth in our letter of March 16, 1966.

Your attention is therefore directed to the last clause in Section 5, First (b) of the Railway Labor Act, as amended, reading as follows:

> "If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

It is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement.

In these circumstances, notice is hereby served in behalf of the Board that its services (except as provided in Section 5, Third, and Section 10 of the law) have this day been terminated under the provisions of the Railway Labor Act.

We are sending to Mr. Wolfe a copy of Mr. Luna's letter dated October 13, 1969.

By order of the NATIONAL MEDIATION BOARD.

/s/ Thomas A. Tracy
Executive Secretary

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 69 C 2401

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation, *Plaintiff*,

v.

UNITED TRANSPORTATION UNION, a voluntary, unincorporated labor association, *Defendant*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on to be heard on plaintiff's verified complaint as amended; defendant's motion to vacate the temporary restraining order; plaintiff's motion for preliminary injunction and defendant's motion to dismiss; the first and second defenses in defendant's verified answer and, the Court having heard the evidence, considered the briefs of the parties and heard the arguments of counsel with respect thereto, and being fully advised in the premises, makes the following findings of fact and conclusions of law:

1) Plaintiff is now and was at all times herein mentioned a corporation, as were and are other railroads with which it has merged and which it controls, and is engaged in the business of transporting persons and property by rail in interstate commerce in the Eastern Division of the Northern Judicial District of Illinois and elsewhere in the State of Illinois and other states of the United States and is a "carrier" within the meaning of and subject to the Railway Labor Act, 45 USC 151 *et seq.*

2) Defendant is a voluntary, unincorporated labor association, the successor to the Brotherhood of Railroad Trainmen, the Switchmen's Union of North America and

other voluntary, unincorporated labor associations and is, as were its predecessors the "representative" under the Railway Labor Act, *supra*, of employees of plaintiff and the corporations with which it has merged and which it controls, hereinafter "Defendant" and is engaged in business as such "representative" in the Eastern Division of the Northern Judicial District of Illinois and elsewhere in the State of Illinois and other states of the United States.

3) The jurisdiction of the Court is invoked by plaintiff under 45 USC §§ 1331 and 1337 as an action arising under the constitution and laws of the United States in which the amount in controversy exceeds $10,000.00 exclusive of interest and costs and as an action under the Railway Labor Act, 45 USC 151 *et seq.*, an Act of Congress regulating commerce, particularly Section 2 First, 45 USC 152 First, thereof.

4) Plaintiff seeks an injunction against a strike and picketing of plaintiff by defendant over a dispute between plaintiff and defendant with respect to whether plaintiff shall have the unrestricted right to determine number and craft of persons to be employed in crews in trains and yard service or whether a specified minimum number of persons shall be employed in such crews; the ground for plaintiff's action is that defendant has not complied with Section 2 First, of the Railway Labor Act, *supra*, which provides that it shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

5) Defendant denies that Section 2 First of the Railway Labor Act is justiciable and denies that the Court has

jurisdiction under the Norris-LaGuardia Act, 29 USC 101, *et seq.*, particularly Sections 4, 7 and 8 thereof, to issue the injunction sought by plaintiff; the requirements of the Railway Labor Act with respect to the dispute between plaintiff and defendant having been exhausted.

6) In July 1965, defendant served a notice on plaintiff and at about the same time on other railroads, under the provisions of Section 6 of the Railway Labor Act, 45 USC 156 of its desire for a collective agreement with plaintiff to be effective January 25, 1966 at the expiration of the Award of Arbitration Board No. 282 which had been established under and in pursuance of Public Law 88-108, 45 USC 157 (1969 Supp.) for a specified minimum number of persons to be employed by plaintiff in crews in train and yard service.

7. Plaintiff, like other railroads on which defendant served the aforementioned notice, refused to negotiate with defendant with respect thereto on the ground it was not required by the Railway Labor Act to do so because the notices were served during the effective period of the Award of Arbitration Board No. 282. Whereupon, defendant requested the National Mediation Board to assume jurisdiction of the dispute arising from such notice and the National Mediation Board did assume jurisdiction thereof in October 1965.

8. In December 1965 plaintiff, as did other railroads, served a notice on defendant under the provisions of Section 6 of the Railway Labor Act, 45 USC 156 of its desire for a collective agreement with plaintiff for the railroad to have the unrestricted right to determine the number and the craft of persons to be employed in crews in train and yard service and further proposed that such notice be handled concurrently with the notice theretofore served on it by defendant in July 1965 and that, if no agreement should be reached by plaintiff and defendant with respect to such notices, the dispute arising therefrom be further

handled under the Railway Labor Act in conjunction and concurrently with disputes between defendant and other railroads arising from similar notices served at about the same time. Such notice was served and such proposals were made by plaintiff and by other railroads expressly subject to the position that it was not required by the Railway Labor Act to negotiate with defendant with respect to the notice served by defendant on plaintiff in July 1965.

9. In January 1966, plaintiff and defendant met with respect to the notice and proposals served in December 1965 by plaintiff upon defendant. No agreement was made. Defendant refused to negotiate concurrently with plaintiff with respect to the notice served by defendant on plaintiff in July 1965. Defendant further refused to negotiate both of said notices in conjunction each with the other or with disputes between defendant and other railroads arising from similar notices served at about the same time. Plaintiff refused to negotiate with defendant independently of similar disputes between defendant and other railroads.

10. Thereafter plaintiff requested the National Mediation Board to, and it did, assume jurisdiction of plaintiff's dispute with defendant arising from the notice served by plaintiff on defendant in December 1965, as did other railroads, with respect to disputes between them and defendant arising from similar notices served by them on defendant in December 1965.

11. From time to time from January 1966 until June 1969, plaintiff and defendant conferred with respect to the dispute arising from the aforementioned notices served by and upon plaintiff and defendant in 1965 but made no agreement settling the dispute.

12. On October 16, 1969, after a proffer by the National Mediation Board to the parties to submit the dispute arising from their aforementioned notices to arbitration was accepted by plaintiff but declined by defendant, the Na-

tional Mediation Board notified the parties that "it is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement", and terminated its jurisdiction of the aforementioned dispute between plaintiff and defendant effective that date.

13. The President of the United States has not established an emergency board to investigate the dispute between the parties hereto arising from their respective 1965 notices heretofore mentioned.

14. The evidence shows that at all times the defendant has taken the position that the only agreement that could be reached was and is that reached by nearly all of the railroads in the United States with defendant, which requires a restoration of approximately 95% of all of the jobs in question.

15. The court does not find as a matter of fact that either of the parties have been guilty of bad faith in bargaining but finds the question of good faith is delegated to the National Mediation Board and has been resolved and is not an issue before this court.

Conclusions of Law

1. This action arises out of and involves a labor dispute within the meaning of the Norris-LaGuardia Act, 29 USC Section 101, *et seq.*

2. Whether there has been compliance with Section 2 First of the Railway Labor Act, 45 USC 152 First, providing that it shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to com-

merce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof is a matter for administrative determination and has been determined by the National Mediation Board under the provisions of Sections 5 and 6 of the Railway Labor Act, 45 USC 155, 156, is not justiciable and this Court does not have jurisdiction to consider or adjudicate disputes with respect to compliance with such subsection, particularly after the National Mediation Board has relinquished its mediatory jurisdiction of a dispute as in this case.

3. The requirements of the Railway Labor Act having been exhausted for more than thirty days with respect to the dispute between plaintiff and defendant arising from the notices served by defendant on plaintiff in July 1965 and by plaintiff on defendant in December 1965 with respect to the number and craft of persons to be employed by plaintiff in its train and yard crews, the Court did not and does not have jurisdiction under the provisions of Sections 4 and 7 of the Norris-LaGuardia Act, 29 USC 104, 107, to issue an injunction, either temporary or permanent against defendant striking and picketing plaintiff as sought by plaintiff herein.

4. Defendant is entitled to receive from plaintiff recompense for loss, expense or damage sustained by defendant as a result of the issuance of the temporary restraining order on November 19, 1969 including all reasonable costs in the defense of such order and in opposing the injunction sought by plaintiff in this proceeding.

5. Defendant's motion to vacate the temporary restraining order heretofore issued should be denied as the question is moot; plaintiff's motion for preliminary injunction should be denied; defendant's motion to dismiss plaintiff's complaint should be allowed, and an appropriate decree should be entered for such purposes.

FINAL DECREE

This cause coming on to be heard on the verified complaint of the plaintiff filed herein on November 20, 1969 as amended; on plaintiff's motion for a preliminary injunction; on defendant's motion filed November 21, 1969 to vacate the temporary restraining order issued herein on November 19, 1969 which was once extended by an order of the Court and thereafter by agreement of the parties until 6:00 p.m., December 12, 1969 and on plaintiff's motion for a preliminary injunction and defendant's motion to dismiss which are part of defendant's verified answer filed herein on December 2, 1969, and

The Court having heard and considered the testimony and written evidence offered by plaintiff in support of its motion for a preliminary injunction and by defendant in opposition thereto and in support of its motions to vacate the temporary restraining order, and to dismiss the complaint and action on December 2, 3, 4 and 5, 1969 and having heard and considered the briefs submitted by and the arguments of counsel and

The Court having tried the action upon the facts without a jury and having heretofore specially found the facts and separably stated its conclusions of law thereon and having directed the entry of an appropriable [sic] decree, it is

ORDERED, ADJUDGED and DECREED that:

1. Defendant's motion to vacate the temporary restraining order issued November 19, 1969 against a strike by defendant is denied, the question now being moot.

2. Plaintiff's motion for preliminary injunction is denied.

3. The plaintiff shall recompense, and pay to, the defendants herein their loss, expense, or damage caused to the defendants by the issuance of the Temporary Restraining Order herein on November 19, 1969 including all reasonable costs and expense of defense against the order

and against the granting of injunctive relief sought in this proceeding and subsequently denied by this Court. For the purpose of determining the amount thereof, this Court reserves jurisdiction of this cause for this purpose only. Hearing thereon will be set upon motion when time for appeal has passed. If appeal is taken, hearing will be set after final mandate herein.

4. Subject to the jurisdiction reserved in the preceding paragraph, defendant's motion to dismiss the complaint is allowed and the complaint and this action is dismissed at plaintiff's cost.

ENTER:

/s/ J. S. PERRY
United States District Judge

Dated: Chicago, Illinois,
December 11, 1969.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Caption omitted in printing]

Friday, December 19, 1969

ORDER

This matter comes before the court on the emergency motion of defendant-appellant Union to vacate the district court's order granting an injunction pending appeal.

A suit was brought by the plaintiff in the District Court for the Northern District of Illinois, Eastern Division, for an injunction against defendant Union from engaging in a strike against plaintiff Railroad over a labor dispute which arose under the Railway Labor Act concerning the composition of various train crews. Plaintiff alleged that defendant Union had not exercised every reasonable effort to settle the dispute pursuant to 45 U.S.C. § 152 of the Railway Act and consequently, an injunction should issue.

The district court decided that the question of "reasonable effort" contained in § 2 was non-justiciable and denied plaintiff's plea for an injunction. The district court, however, granted an injunction pending appeal, being of the opinion that a strike by the Union would moot the appeal and cause irreparable harm to plaintiff and the public. Being fully advised and after careful consideration,

IT IS ORDERED that the emergency motion to vacate forthwith the restraining order pending appeal be taken with the case;

IT IS FURTHER ORDERED that the hearing of the appeal of the defendant Union to vacate the injunction pending appeal and the appeal of the plaintiff Railway from the denial of an injunction below will be accelerated, and that plaintiff may serve and file an additional brief, covering its appeal as well as defendant's on or before December 29.

1969; defendant may serve and file an additional brief, covering both appeals, on or before January 5, 1970:

IT IS FURTHER ORDERED that both appeals be set for oral argument on the afternoon of January 7, 1970, at 2:00 p.m.; printed briefs will not be required and appendices will be dispensed with.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969—JANUARY SESSION, 1970

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 18109

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Plaintiff-Appellant,

v.

UNITED TRANSPORTATION UNION, *Defendant-Appellee.*

No. 18145

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Plaintiff-Appellee,

v.

UNITED TRANSPORTATION UNION, *Defendant-Appellant.*

MARCH 6, 1970

Before SWYGERT, *Chief Judge,* FAIRCHILD and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* This opinion contains our decision in two appeals. No. 18145 is the appeal of the Chicago and North Western Railway Company (Railway) from the district court's finding that § 2, First,[1] of the

[1] 45 U.S.C. § 152, First, provides:

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Railway Labor Act (45 U.S.C. § 152, First) requiring the parties to exert "every reasonable effort" to settle their disputes was not a requirement which anticipated judicial enforcement. Consequently, since the district court found that it did not have jurisdiction to decide whether § 2, First, was complied with, and all other procedures of the Railway Labor Act having been exhausted, the district court held that the Norris-LaGuardia Act [2] prohibited the enjoining of a threatened strike by the United Transportation Union (Union). The district court, however, granted an injunction against the threatened Union strike pending an appeal of its decision of the justiciability of § 2, First, and the correctness of the court's order granting the injunction pending appeal is the subject of the second appeal, No. 18109, in which the Union is the appellant. We affirm the decision of the district court in both appeals.

The factual basis of the two appeals arose out of a dispute between the United Transportation Union and the Chicago North Western Railway Company over the question of how many brakemen should be employed on the Railway's trains. Such a dispute is commonly known as a crew consist controversy. The dispute was initiated in July of 1965 by service by the Union upon the Railway of notices pursuant to § 6 of the Railway Labor Act (Act)

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[2] Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104) provides in relevant part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> * * * * *

(45 U.S.C. § 156)[3] requesting a change in agreements to require that not less than two brakemen be employed on every freight and yard crew. In response, the Railway in December of 1965 served notices requesting an agreement that the existing rules respecting minimum crews be rescinded and the matter of crew size be committed to the judgment of management.[4]

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[3] Section 6 (45 U.S.C. § 156) provides:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

[4] While the historical background of the litigation involved in crew consist controversies is not directly relevant, a brief discussion of the more recent developments in this area may be helpful for a more meaningful grasp of the problems.

The dispute over the number of brakemen to be employed began to be discussed in 1959 when most of the nation's railroads served notices upon various unions under § 6 of the Act proposing rules that would permit, in the discretion of management, the elimination of firemen and reduction in the number of brakemen. The unions countered in 1960 by serving uniform notices proposing a national rule requiring a minimum of two brakemen on every crew.

The issues were joined and negotiated on an industry-wide basis and were not resolved until in the face of a threatened nationwide

By November of 1969, the parties had held conferences pursuant to § 6 (45 U.S.C. § 156);[5] the National Mediation Board had mediated the dispute after invocation of mediation pursuant to § 5 (45 U.S.C. § 155);[6] the Board, pur-

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strike the Congress enacted a compulsory arbitration statute. (77 Stat. 132).

Under the arbitration prescribed by the Congress in 1963, Arbitration Board No. 282 established a national procedure for resolving the "crew consist" issue over the number of brakemen on train crews. The parties were directed to conduct local negotiations on each carrier, and, in the event of failure of agreement, to conduct local arbitration, all pursuant to national guidelines respecting questions of work burden and safety.

The arbitration award expired in January of 1966. The United Transportation Union served notices upon more than eighty railroads pursuant to § 6, proposing restoration of the crew of one conductor and two brakemen. The railroads responded with a request for an agreement permitting crew reductions beyond those authorized under the award of Arbitration Board No. 282.

[5] See footnote 3, *supra*.

[6] Section 5 First and Second (45 U.S.C. § 155 First and Second) provide:

> First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:
>
> (a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.
>
> (b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.
>
> The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.
>
> In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this

suant to § 5, had concluded that its efforts had been unsuccessful and had proffered arbitration; the Railway had accepted that proffer but the Union declined; the Board thereupon, on October 16, 1969, had terminated its services pursuant to § 5. The President had not appointed an Emergency Board under § 10 (45 U.S.C. § 160),[7] and the

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title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

[7] 45 U.S.C. § 160 provides:

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the

§ 5 thirty day "cooling off" period respecting maintenance of the status quo had expired.

At the end of November, the Railway instituted a lawsuit in the district court asking the court to declare that the procedures of the Railway Labor Act had not been exhausted and to enjoin the Union from exercising self-help in the form of strike. The Railway alleged that the Union had not discharged all its obligations under the Railway Labor Act in that it had not complied with § 2, First, which imposes upon the parties the "duty to exert every reasonable effort" to settle their disputes. At the same time the Railway filed its complaint it moved for a temporary restraining order which the court granted.

The Railway then presented evidence to show that the Union had violated § 2, First, by not bargaining in good faith. At the conclusion of the Railway's case, the court granted defendant Union's motion to dismiss the complaint and dissolved the temporary restraining order on the basis that:

> § 2, First, . . . is a matter for administrative determination and has been determined by the National Mediation Board under the provisions of Sections 5 and 6 of the Railway Labor Act, 45 U.S.C. 155, 156, is not justiciable and this Court does not have

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dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

jurisdiction to consider or adjudicate disputes with respect to compliance with such subsection, particularly after the National Mediation Board has relinquished its mediatory jurisdiction of a dispute as in this case.

The district court, however, recognizing that there was case law contrary to its decision, that a strike would result in a mooting of the appeal, and that "such a strike would irreparably injure the plaintiff and the public," granted plaintiff Railway's motion for an injunction pending appeal.

Three days after the district court's decision, the Union filed an emergency motion in this court to vacate the injunction pending appeal. This court issued an order directing that the Union's motion to vacate the injunction pending appeal be taken with the Railway's appeal from the district court's denial of an injunction below. The order also directed that the appeals be expedited. (See *Chicago and North Western Railway Company* v. *United Transportation Union*, No. 18109 unpublished order, 7th Cir. Dec. 19, 1969.)

By ordering that the Union's motion to vacate the injunction pending appeal be taken with the expedited appeal from the district court's denial of a preliminary injunction, we in effect upheld the granting of the injunction pending appeal. Our order of December 19, 1969, in that respect is inconsistent with this court's decision in *Elgin J. & E. Ry. Co.* v. *Brotherhood of Railroad Trainmen*, 302 F. 2d 545 (7th Cir. 1962), which held that if the Norris-LaGuardia Act prohibits the granting of an injunction below it also prohibits the granting of an injunction pending appeal. We are no longer of the opinion that the *Elgin* case is the correct interpretation of the Norris-LaGuardia Act as it applies to injunctions pending appeal and overrule our decision in *Elgin*. While it may be argued that our decision upholding the district court's denial of a preliminary in-

junction because of the non-justiciability of § 2, First, (see pp. 985-999 *infra*) moots the question of whether the district court erred in granting an injunction pending appeal, the necessity of an explanation of our inconsistent action in our December 19, 1969, order maintaining the injunction pending an expedited appeal and the realization that the continued adherence to an incorrect opinion could cause irreparable harm for many years before the case comes before this court in a technically correct posture, persuades us that the question is not moot but should at this time be decided.

We hold that the Norris-LaGuardia Act does not prohibit the district court from granting an injunction pending appeal even though the court determines that Norris-LaGuardia prohibits an injunction below. The power of a district court to grant an injunction to maintain the status quo pending appeal was first codified by the "All Writs Act" contained in the Judiciary Act of 1789, 28 U.S.C. § 1651. In *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 316 U.S. 4, 62 S. Ct. 875, 86 L.Ed. 1229 (1942), the Supreme Court in upholding this power stated:

> It has always been held, therefore, that as a part of its traditional equipment for the administration of justice, a federal court can stay enforcement of a judgment pending the outcome of an appeal.
> *Id.* at 9-10, 62 S.Ct. at 881.

See also Hovey v. McDonald, 109 U.S. 150, 161, 3 S. Ct. 136, 27 L.Ed. 888 (1883). Absent the prohibitions of the Norris-LaGuardia Act, the law is established that even if a district court determines it lacks jurisdiction to grant an injunction pending appeal, it has the power to preserve appellate review of its determination that it lacked jurisdiction. *See United States v. Shipp*, 203 U.S. 563, 573, 27 S. Ct. 165, 51 L.Ed. 319 (1906); *see also Peltway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1002-3 (5th Cir. 1969); *Eastern Greyhound Lines v. Fusco*, 310 F.2d 632, 634 (6th Cir. 1962).

In the instant case as in this court's earlier opinion in the *Elgin* case, the injunction pending appeal was issued pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.[8] The Rule itself is not a jurisdictional grant but merely a codification of a district court's power to maintain the status quo pending appeal. In *Elgin*, the court relied on Rule 82 of the Federal Rules of Civil Procedure[9] which provides that the promulgation of the Federal Rules does not expand the district court's jurisdiction, and Rule 65(e)[10] which provides that the Federal Rules "do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee." The *Elgin* court construed Rules 82 and 65(e) as denying the power of the district court to grant an injunction pending appeal pursuant to 62(c) in cases where the Norris-LaGuardia Act

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[8] Rule 62(c) of the Federal Rules of Civil Procedure provides in relevant part:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

[9] Rule 82 provides in relevant part:

> These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.

[10] Rule 65(e) provides:

> These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C. § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C. § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

prohibited the granting of an injunction in the district court. The *Elgin* court's application of the three Federal Rules of Civil Procedure is correct only if we begin with the premise that Congress by enacting the Norris-LaGuardia Act intended to limit in labor disputes the inherent power of district courts under the "All Writs Act" to grant injunctions pending appeal. If the Congress did not intend such a limitation on the district court's power, Rule 62(c) can be applied without any conflict with the dictates of Rule 82 and Rule 65(c).

There is nothing in the text of the Norris-LaGuardia Act or in the legislative history surrounding the drafting and enactment of the Act indicating a Congressional intent to remove from the district courts their long-recognized power to grant injunctions pending appeal. To remove from the district courts the power to grant injunctions pending appeal and thus the power to maintain the status quo in all cases where the district court has decided that the Norris-LaGuardia Act prohibited an injunction is to in effect make the district court the court of last resort on these matters regardless of the difficulty or novelty of the issues involved. In the absence of any specific Congressional intention to remove the power of district courts to grant injunctions pending appeal, we decline to read into the Act such a serious limitation into the judicial review process.

The United States Supreme Court in *United States* v. *United Mine Workers*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947) supports our decision. The question before the district court in United Mine Workers involved the applicability of the Norris-LaGuardia Act so as to bar the United States from securing an injunction against a strike by United Mine Workers. The district court granted a temporary restraining order which the Union did not obey and the district court found the Union officers to be in contempt. The Supreme Court affirmed the judgment of contempt, finding the Nor-

ris-LaGuardia Act inapplicable. The Court went on to hold, however, that even if Norris-LaGuardia applied, the district court still had the power to preserve the status quo while it decided the underlying jurisdictional issue posed by Norris-LaGuardia:

> In these circumstances, the District Court unquestionably had the power to issue a restraining order for the purposes of preserving existing conditions pending a decision upon its own jurisdiction. 330 U.S. at 290, 67 S. Ct. at 695.

While it is true that *United Mine Workers* involved a temporary restraining order and not as the case at bar an injunction pending appeal, both cases deal with difficult questions of jurisdiction. We read the Supreme Court's holding in *United Mine Workers*, that despite the prohibitions of Norris-LaGuardia the district court has inherent injunctive power to grant a temporary restraining order to preserve the status quo while deciding difficult or novel questions determining its own jurisdiction, as support for the proposition that the district court, despite Norris-LaGuardia, also has the inherent power to grant an injunction pending a review of its determination of these jurisdictional issues.

The reasoning of Justice Frankfurter in his concurring opinion in *United Mine Workers* would seem to accept our analysis and its extension to this case. Although Justice Frankfurter was of the opinion that the Norris-LaGuardia Act prohibited permanent injunctive relief in the factual situation, he concurred in the majority's result on the basis that the Norris-LaGuardia Act did not bar interim injunctive relief necessary to preserve the status quo while the court decided the jurisdictional question and while that district court jurisdictional determination was being reviewed by the appellate court:

> To suggest that the right to determine so complicated and novel an issue could not be brought within the

> cognizance of the district court, *and eventually of this court,* is to deny the place of the judiciary in our scheme of government. 330 U.S. at 310, 67 S.Ct. at 704 [emphasis supplied].

Although this issue has not been discussed in depth by other courts of appeals, the circuits which have been faced with the problem of district court injunctions pending appeal in a labor dispute have acted consistently with our decision in this appeal. See *Missouri-Kansas-Texas RR. Co.* v. *Brotherhood of Railroad Trainmen,* 342 F. 2d 298 (5th Cir. 1965); *Texas and N.O. RR. Co.* v. *Brotherhood of Railroad Trainmen,* 307 F. 2d 151, 153, 163 (5th Cir. 1962); *Pan-American World Airways* v. *United Brotherhood of Carpenters,* 324 F. 2d 217 (9th Cir. 1963); the district court, though denying a preliminary injunction, granted a 10-day stay to preserve the status quo pending appeal to the Court of Appeals); *Norfolk & P.B.L. RR. Co.* v. *Brotherhood of Railroad Trainmen,* 248 F. 2d 34 (4th Cir. 1957; the district court ordered the temporary injunction dissolved, though by supplemental order, the execution of the court's judgment was suspended pending appeal by the carrier).

While we are cognizant of the purposes of the Norris-LaGuardia Act to remove the injunctive power of the judiciary from the field of labor disputes, we are also mindful of the necessity of judicial review to our legal system. In the absence of a specific Congressional directive, we strike the balance in favor of maintaining the status quo to allow time for a meaningful judicial review.[11, 11a]

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[11] We also reject the appellant Union's contention that the district court abused its discretion in granting the injunction pending appeal. We find no such abuse. Nor do we find the form of the injunction issued pending appeal improper.

[11a] Since this opinion overrules *Elgin J. & E. Ry. Co.* v. *Brotherhood of Railroad Trainmen,* 302 F. 2d 545 (7th Cir. 1962), we have circulated it to the full active court. No judge has requested a hearing *en banc.*

We now come to the Railroad's appeal in No. 18145 from the decision of the court below that § 2, First, of the Railway Labor Act (45 U.S.C. § 152) is non-justiciable. We are of the opinion that § 2, First, does not contemplate judicial enforcement of its "reasonable effort" requirement and, therefore, affirm the decision of the district court judge.

We construe § 2, First, as a statement of the purpose and policy of the subsequent provisions of the Act and not as a specific requirement anticipating judicial enforcement.

> Nor does § 2 Second make justiciable what otherwise is not. . . . But § 2, Second like § 2, First merely states the policy which those other provisions buttress with more particularized commands. *General Committee of Adjustment of Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Company*, 320 U.S. 323, 334, 64 S. Ct. 146, 88 L.Ed. 76 (1943).

To imply judicial enforcement to § 2, First, would insert a judicial inquiry into every step of the Railway Labor procedures to determine in each case if reasonable effort is being exerted; this is a role which we believe Congress did not intend the courts play in the settlement of Railway disputes.

In *General Committee* v. *M.-K.-T. RR. Co.*, *supra*, the Supreme Court in deciding certain questions of representation under the Railway Labor Act were not justiciable stated:

> In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery

and involved the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow, it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. *The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.*

Id. at 332-333, 64 S.Ct. at 150-151. [emphasis supplied].

Later in its opinion the Court reiterated:

[T]he conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the selective list of problems which it was ready to place in the adjudicatory channel. All else is left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability. *Id.* at 337, 64 S. Ct. at 152.

We believe that § 2, First, was intended to play an integral part in facilitating the other more specific procedures of the Railway Act: "The heart of the Railway Labor Act is the duty, imposed by § 2 First upon management and labor. . . ." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377, 89 S.Ct. 1109, 1115, 22 L.Ed. 2d 344 (1969). However, we find that the role of determining whether "reasonable effort" is being practiced by the parties is not a judicial one but a role which should be left to the National Mediation Board.

Under the procedures of the Act, the National Mediation Board plays the dominant role in major disputes within the framework of the Act. Section 6 of the Act provides:

[I]n every case . . . where the services of the Mediation Board have been requested by either party or

> said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by § 5 of this Act, by the Mediation Board.

Section 5 provides in pertinent part that after the services of the Board are invoked or proffered:

> [S]aid Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.
>
> If arbitration at the request by one or both parties shall be refused, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under § 10 of this Act, no change shall be made in the rates of pay, rules or working conditions or established practices in effect prior to the time the dispute arose.

Thus it can be seen that the Mediation Board plays a pivotal role in the workings of the Act. It maintains the status quo, attempts to bring about a voluntary settlement between the parties, tries to induce the parties to submit to arbitration after a determination that voluntary settlement cannot be reached, and then in effect, if § 10 and the Emergency Board are not appropriate, the Mediation Board after a thirty-day period releases its hold on the status quo.

We believe this integral role of the Mediation Board requires it and not the judiciary to enforce compliance with § 2, First. The Mediation Board is certainly better qualified to determine if the parties are exercising reasonable effort in settling their dispute. If the Mediation Board is of the opinion that one of the parties is not negotiating in good faith, it may simply retain jurisdiction over the mediation process until it believes good faith is being exercised. The Act provides that while the Board retains jurisdiction the parties must maintain the status quo. The Board can refuse to certify that "its mediatory efforts have failed" and thus prevent the exercise of self-help until it is satisfied that its mediatory efforts had a chance to fail, *i.e.*, that the parties were bargaining in good faith. Mediation cannot fail if it never had a chance to succeed.[12]

Instead of involving the federal courts in the determination of whether a reasonable effort had been exercised, after all the procedures of the Act have been completed, it seems much more efficient and sensible to allow the Mediation Board while the Act's procedures are being carried out to determine if a reasonable effort is being exercised by the parties. To allow the Mediation Board rather than the courts to perform this function removes the courts from having to issue injunctions in labor disputes (because § 2, First, had not been complied with), thus avoiding conflict with the dictates and policy of the Norris-LaGuardia Act. In addition, a judicial enforcement of § 2, First, would also require the federal courts to remand the dispute back to a certain stage in the procedures of the Act where one party was not bargaining in good faith. We find no ma-

[12] Of course, if one party is not negotiating in good faith as a dilatory tactic to prevent the other party from eventually exercising self-help, the Board can decide to release jurisdiction of the dispute and allow the procedures of the Act to be exhausted in order to allow for self-help.

chinery nor guidelines in the Act which would aid the court in making this difficult determination.

We are mindful that the role of the Mediation Board is basically a non-adjudicatory one, *see e.g., Detroit & Toledo Shore Line Railroad Company* v. *United Transportation Union*, 396 U.S. 142, 90 S.Ct. 294, 24 L.Ed. 2d 325 (Dec. 9, 1969). However, we recognize that for the procedures of the Act to be effective, the Mediation Board must accept in certain instances a limited "quasi adjudicatory" posture. Certainly the authority conferred on the Board pursuant to § 2, Ninth [13] (45 U.S.C. § 152, Ninth), to determine the

[13] 45 U.S.C. § 152, Ninth, provides:

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

proper representatives of the employees can be considered adjudicatory or quasi adjudicatory in nature. Similarly, we interpret § 2, First, to confer on the Board pursuant to its express mediatory power, the power, whether it may be considered adjudicatory or quasi adjudicatory, to make sure the parties are exercising every reasonable effort. We do not feel this limited power under § 2, First, will significantly impair the Board's impartial job as a mediator.

We find that the expertise, proximity to the negotiation process and power to maintain the status quo of the Mediation Board make it singularly well suited to implement the Congressional intent and purpose behind the inclusion of § 2, First. While we agree that the procedures of the Act are purposely long and drawn out in order for the parties to reach agreement and prevent invocation of self-help, we are of the opinion that the tacking on of judicial review after a completion of the Act's procedures does nothing but involve courts in intricate factual questions of intent while unreasonably postponing the parties' right to self-help.

The Railway places great reliance that § 2, First, is justiciable upon the Supreme Court's decision in *Virginia Ry. v. System Federation*, 300 U.S. 515, 57 S.Ct. 592, 81 L. Ed. 789 (1937). In *Virginia Ry.*, the railroad had refused to engage in collective bargaining with the Federation after the National Mediation Board, acting under § 2, Ninth, of the Railway Act, determined and certified the Federation to be the representative of the shop craft employees for collective bargaining with the railroad. The Supreme Court upheld a district court injunction which required the railroad to recognize and bargain with the Federation despite the railroad's argument that § 2, Ninth, was not justiciable. While the injunction also required the railroad to make every reasonable effort to settle disputes with the Federation thus

in fact invoking the dictates of § 2, First, the opinion did not state nor imply that whether reasonable effort is in fact complied with by either party was a question for the courts to answer. The Supreme Court did not suggest that the district court retain jurisdiction to determine if the parties were negotiating in good faith, nor did it suggest a further judicial proceeding if conferences between the railway company and the Federation failed. Thus while *Virginia Ry.* holds that § 2, Ninth, contemplates judicial enforcement of the requirement to bargain with the Board's accredited employee representative, it does not hold that judicial enforcement is available to determine whether the parties are in fact negotiating in good faith. As we read *Virginia Ry.*, it allows for judicial enforcement of the specific dictates of § 2, Ninth, and simply provides that when the carrier and the employees' representatives are negotiating they should be guided by the other provisions of the Railway Labor Act including § 2, First.

In addition, to *Virginia Ry.*, the railway also relies on a recent decision by the Fourth Circuit in *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n Int'l*, 416 F. 2d 633 (4th Cir. 1969) (petition for cert. filed, 396 U.S.___, 90 S.Ct. 924, 25 L.Ed. 2d ___), in which the court upheld a district court injunction against a threatened strike. The court in a holding opposite to our conclusions found:

> Restraining the parties from self-help through strikes or otherwise, until they have complied with the duty to bargain in good faith vindicates the Congressional purpose of providing machinery to prevent strikes without creating an irreconcilable conflict with the Norris-LaGuardia Act. *Id.* at 636.

and thus held § 2, First, to be justiciable. We cannot agree with the Fourth Circuit decision. The machinery to prevent strikes which was the Congressional purpose in enact-

ing the Railway Labor Act is contained within the procedures of the Act and not outside it in the injunctive power of the federal courts. We believe that the provisions of the Act and the powers of the National Mediation Board can enforce the duty to bargain in good faith without the need of judicial interference.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Friday, March 6, 1970

Before: HON. LUTHER M. SWYGERT, *Chief Judge*, HON. THOMAS E. FAIRCHILD, *Circuit Judge*, HON. OTTO KERNER, *Circuit Judge*.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 18109, 18145

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, *Plaintiff-Appellee, (Cross-Appellant)*,

v.

UNITED TRANSPORTATION UNION, *Defendant-Appellant, (Cross Appellee)*.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the decision of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that there be no recovery of costs between the parties to these appeals.

Supreme Court of the United States

No. 189 ----- , *October Term, 19* 70

Chicago and North Western Railway Company,

Petitioner,

v.

United Transportation Union

ORDER ALLOWING CERTIORARI. Filed October 12, 1970.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.